UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 416—August Term, 1991

(Argued October 28, 1991 Decided April 13, 1992)
(Amended Opinion Filed May 8, 1992)

Docket No. 91-5038

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,
Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.,
Plaintiff-Appellee,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, as Commissioner of Taxation and Finance; EDWARD V. REGAN, as Comptroller of the State of New York,
Defendants-Appellants.

Before:

OAKES, *Chief Judge,*
FEINBERG and ALTIMARI, *Circuit Judges.*

The New York State Department of Taxation and Finance, James W. Wetzler, as New York Commissioner of Taxation and Finance, and Edward V. Regan, as Comptroller of the State of New York, appeal from an order of the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*) affirming the opinion and order of the Bankruptcy Court (Tina L. Brozman, *Bankruptcy Court Judge*). The Bankruptcy Court granted 995 Fifth Avenue Associates, L.P.'s motion for summary judgment and ordered the New York State Department of Taxation and Finance to refund New York Gains Tax, N.Y. Tax Law § 1441 (McKinney 1987) paid by 995 Fifth Avenue Associates, L.P.

Affirmed in part and reversed in part.

DAVID S. COOK, Senior Attorney, Attorney General's Office, State of New York, New York, NY (Robert Abrams, Attorney General, Frederic L. Lieberman, Marcie S. Mintz, Assistant Attorneys General, of counsel), *for Defendants-Appellants*.

JOSHUA J. ANGEL, New York, NY (Leonard H. Gerson, Ira R. Abel, Angel & Frankel, P.C., of counsel), *for Plaintiff-Appellee*.

OAKES, *Chief Judge*:

This appeal requires us to decide whether the Eleventh Amendment bars a debtor's suit to recover taxes paid to the State of New York, and whether 11 U.S.C. § 1146(c)

(1988) exempts the debtor from payment of the New York gains tax on the transfer of property, N.Y. Tax Law § 1441 (McKinney 1987). The United States Bankruptcy Court for the Southern District of New York, Tina L. Brozman, *Bankruptcy Court Judge*, found that the New York State Department of Taxation and Finance, James W. Wetzler, as New York Commissioner of Taxation and Finance, and Edward V. Regan, as Comptroller of the State of New York (collectively "State of New York," "New York," or "appellant") waived the State of New York's immunity from suit by filing a proof of claim in the bankruptcy proceeding, found that the debtor was exempt from the gains tax, and accordingly ordered New York to refund the gains tax paid by the debtor, 995 Fifth Avenue Associates, L.P. ("Fifth Avenue"). New York appealed to the United States District Court for the Southern District of New York. Leonard B. Sand, *District Judge*, affirmed the opinion and order of the bankruptcy court and the State of New York now appeals.

For the reasons set forth below, we affirm in part and reverse in part.

BACKGROUND

The relevant facts are not in dispute. The debtor, Fifth Avenue, operated the Stanhope Hotel. It filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February of 1988 and thereafter continued to operate the hotel as debtor in possession. Pursuant to a plan of reorganization, the bankruptcy court authorized the sale of Fifth Avenue's interest in the hotel at a price of $76 million. The court's order specifically declared that, because the sale was part of a plan of reorganization, § 1146(c) rendered the sale exempt from all transfer taxes.

On January 12, 1989, the day before the scheduled closing, in accordance with N. Y. Tax Law § 1447 (McKinney 1987), New York issued a Tentative Assessment and Return imposing a gains tax of $2,608,603.80 on the sale of the property. New York subsequently denied the debtor's request for an exemption from the tax under 11 U.S.C. § 1146(c). Because New York law prohibits recordation of the deed without payment of tax due under a Tentative Assessment and Return, Fifth Avenue could not close the sale as scheduled without paying the gains tax. Faced with this dilemma, the debtor paid the tax under protest, enabling it to record the deed and close the sale.

In March 1989, the debtor brought an adversary proceeding in bankruptcy court against the State of New York, seeking, *inter alia*, a declaration that § 1146(c) exempted the debtor from the gains tax, and an order directing that the payment made to New York be refunded. Some months later, after the bankruptcy court heard oral argument in the proceeding, the State of New York filed an administrative expense claim for gains tax liability of $2,137,496.76, an amount in addition to the approximately $2.6 million already imposed by the state and paid by the debtor.

The bankruptcy court found that the debtor's sale was exempt from the gains tax under § 1146(c). In response to the State of New York's Eleventh Amendment immunity argument, the bankruptcy court held that pursuant to 11 U.S.C. § 106(a) (1988), New York had waived its Eleventh Amendment immunity by filing the administrative expense claim for additional gains tax. The district court affirmed the decision and order of the bankruptcy court.

DISCUSSION

I. Eleventh Amendment Immunity

Appellant argues that the Eleventh Amendment barred both the bankruptcy court and the district court from considering whether the debtor was exempt from payment of the New York gains tax. The Eleventh Amendment, where applicable, deprives a federal court of jurisdiction. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Thus, prior to addressing the merits of this case we must first determine whether Eleventh Amendment immunity bars our jurisdiction. We hold that it does not.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The reach of the amendment was judicially expanded beyond its text in *Hans v. Louisiana*, 134 U.S. 1 (1890), to bar citizens from suing their own states in federal court. The Supreme Court has also consistently held that federal suits by private citizens that seek damages to be paid out of the state treasury are barred by the Eleventh Amendment. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Despite this general bar to suits against states created by the Eleventh Amendment, there are two well-established ways to provide judicial power over such cases: abrogation of immunity by Congress and waiver of immunity by a state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). A purported Con-

gressional abrogation of Eleventh Amendment immunity is not effective, however, unless it meets a two-part test set forth by the Court. First, Congress must make its intent to abrogate Eleventh Amendment immunity "unmistakably clear." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Second, the constitutional provision under which Congress legislates its purported abrogation must grant Congress the power to override the Eleventh Amendment. *Union Gas*, 491 U.S. at 13-23. Abrogation of Eleventh Amendment immunity typically occurs when Congress enacts a new federal statutory cause of action. *See, e.g. Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Eleventh Amendment immunity abrogated for suit to recover damages from the State for gender-based employment discrimination under Title VII); *Union Gas Co.*, 491 U.S. at 23 (Eleventh Amendment immunity abrogated for suit to recover costs from the State for environmental clean-up under CERCLA).

Waiver of Eleventh Amendment immunity, in contrast to abrogation, is not hinged to a specific federal statutory cause of action. Instead, it is triggered by some affirmative activity of a state, such as a state's enactment of legislation by which it consents to be sued in federal court, *see, e.g., Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307-09 (1990), and, as here, a state's participation in litigation in federal court. In *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), for example, the State of Rhode Island was deemed to have waived its Eleventh Amendment immunity by intervening in a case as a claimant of a fund. And the Court in *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947), held that where the State of New Jersey filed a claim against a fund in bankruptcy court, in a case where no judgment was sought against the

State, the State waived its immunity. Thus, as the district court noted, it is long-established that a state's participation in a bankruptcy proceeding can trigger a waiver of immunity.

The State of New York does not take issue with this general principle. Rather, it argues that the provision of the Bankruptcy Code under which the bankruptcy court deemed the State to have waived its Eleventh Amendment immunity—11 U.S.C. § 106(a)—represents an abrogation provision, not a waiver scheme. As an abrogation provision, New York contends, § 106(a) is unconstitutional because Congress lacks the authority to abrogate sovereign immunity when enacting legislation under the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. We disagree with New York's characterization of § 106(a).

Section 106(a) provides:

> A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

The plain meaning of these words obviously reflects Congress's intent to provide a *waiver* of immunity where "a governmental unit" files a claim in the bankruptcy court. The scope of the waiver, of course, remains limited; upon filing a claim the governmental unit subjects itself only to claims that arose from the same transaction or occurrence that formed the basis of the governmental unit's claim. Our conclusion derives further support from two recent cases where the Supreme Court, albeit in dicta, stated that § 106(a) provides for a limited waiver of immunity. *See Hoffman v. Connecticut Income Maint.*

Dept., 492 U.S. 96, 101-02 (1989); *U.S. v. Nordic Village, Inc.*, No. 90-1629, slip op. at 4-6 (U.S. Feb. 25, 1992).

In addition, Congress did not use the language of abrogation in §106(a). Compare, for example, the language used by Congress in *Union Gas*, where the Court held that Congress abrogated Eleventh Amendment immunity in making states liable for cleanup costs under CERCLA. *Union Gas*, 491 U.S. at 13. In the provisions there at issue, Congress stated that any "person," "owner[,] and operator" shall be liable. 42 U.S.C. § 9607(a) (1988). Congress went on to include states in the definition of a "person," 42 U.S.C. § 9601(21), and except in very limited situations Congress provided that states fall within the meaning of the term "owner or operator." *See* 42 U.S.C. § 9601(20)(D). Thus, CERCLA contains the language of abrogation by clearly stating that states can be liable for cleanup costs. Section 106(a) contains no similar statement regarding the liability of states for a specific class of damages.

Not only is the wording of § 106(a) different from language aimed at a general override of immunity, but this provision provides for suits against states by a route that differs markedly from the typical abrogation context. Typically, abrogation occurs when Congress has enacted a cause of action generally and seeks to render states, in particular, liable for damages "along with everyone else." *Union Gas*, 491 U.S. at 8. Section 106(a), however, renders a state liable to suit only when the state participates in a bankruptcy proceeding by filing a claim.

Thus, § 106(a) creates a waiver scheme; it is not an abrogation provision. Indeed, the section largely partakes of the waiver by participation doctrine that received the Supreme Court's imprimatur in *Gardner*, 329 U.S. at 574.

Because we find that § 106(a) specifies when a state has waived its Eleventh Amendment immunity, we need not address appellant's contention that Congress lacks the authority to abrogate sovereign immunity when enacting legislation under the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.

Next, we consider the validity of the purported waiver of Eleventh Amendment immunity under § 106(a). We note at the outset that, like the First Circuit, we see no constitutional barrier to a waiver of Eleventh Amendment immunity as provided in § 106(a). In *WJM, Inc. v. Massachusetts Dept. of Public Welfare*, 840 F.2d 996, 1002-005 (1st Cir. 1988), the court held that Congress possesses the authority to condition a state's participation in a bankruptcy proceeding on its waiver of Eleventh Amendment immunity. The court in *WJM* relied in part on *Atascadero*, where the Court considered whether states can be sued for damages under a Congressionally-created cause of action. In *Atascadero*, the Court determined that the Congressional legislation in question fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. After citing this language, the *WJM* court reasoned:

> The logical inference from this and other language in *Atascadero*, however, is that Congress *may* effectively condition a state's participation in a federal program on a state's consent to federal jurisdiction, so long as Congress manifests a clear intent to this effect.

WJM, 840 F.2d at 1003. We agree with the First Circuit's analysis.

Our conclusion regarding Congressional authority, however, does not end the inquiry, because we will only give effect to Congressional legislation that purports to condition state participation in litigation on a state's waiver of Eleventh Amendment immunity when Congress "manifest[s] a clear intent" to do so. *Atascadero*, 473 U.S. at 247. This requirement is analogous to the test the Court applies to determine the validity of a state's waiver of Eleventh Amendment immunity by state legislation. In that context, "[t]he Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Feeney*, 495 U.S. at 299 (quoting *Atascadero*, 473 U.S. at 239-40 and *Edelman*, 415 U.S. at 673). We discern no substantive difference between the test for a Congressional waiver scheme, as set forth in *Atascadero*, and the test for a waiver by state legislation, as applied in *Feeney*. Thus, we must again turn to the language of § 106(a) to determine whether it plainly requires a waiver of Eleventh Amendment immunity and "leave[s] no room for any other reasonable construction." *Atascadero*, 473 U.S. at 240.

Appellant argues that no such waiver of Eleventh Amendment immunity is implicated by § 106(a) because, by its terms, it fails to mention the Eleventh Amendment. Explicit mention of the Eleventh Amendment, however, has never been a requirement for waiver of immunity. For example, in *Feeney*, the Court found that by statute the states of New York and New Jersey had waived their Eleventh Amendment immunity, but nowhere did the statutory provisions mention the Eleventh Amendment. *Feeney*, 495 U.S. at 303, 306-09. *See also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, *J.*, concurring)

(statutory text may override Eleventh Amendment immunity without explicit reference to either state sovereign immunity or the Eleventh Amendment). Similarly, the text's failure specifically to mention states is irrelevant: § 106(a) uses the term "governmental unit," which the Bankruptcy Code defines in 11 U.S.C. § 101(26) (1988) as including a "State." To hold otherwise would ignore the fact that Congress routinely expresses its intent with statutes drafted with definitional cross-references.[1] Accordingly, we find that § 106(a) plainly expresses Congress's intent to provide for a limited waiver of Eleventh Amendment immunity and "leave[s] no room for any other reasonable construction." *Atascadero*, 473 U.S. at 240.

Applying § 106(a) to the facts of this case, we find that the State of New York, by filing an administrative expense claim for $2,137,496.76, waived its Eleventh Amendment immunity with respect to the $2,608,603.80 million in gains tax paid by the debtor. As we have stated, § 106(a) provides for waiver of Eleventh Amendment immunity from any claim against the state "that arose out of the same transaction or occurrence out of which such governmental unit's claim arose." Here, the State's administrative expense claim arose from additional gains tax levied on the sale of the Stanhope Hotel. Fifth Avenue's claim against the State for a refund also arose from gains tax imposed on the sale of the Stanhope Hotel. Thus, appellee's claim for a tax refund arose from the same transaction or occurrence—the sale of the Stanhope Hotel—as the State's claim for additional taxes. Accord-

---

1 The State of New York also argues that § 106(a) is insufficiently clear because it does not mention the filing of a proof of claim. We do not believe this fact renders Congress's intent unclear, because the only reasonable construction of § 106(a) is that waiver will arise only if a claim is actually filed.

ingly, the Eleventh Amendment does not bar us from reaching the merits of this case.

II. Whether the Gains Tax is a "Stamp Tax or Similar Tax"

We now consider whether the New York gains tax, N.Y. Tax Law § 1441 (McKinney 1987), is a "stamp tax or similar tax" within the meaning of 11 U.S.C. § 1146(c). Because the New York gains tax is not a "stamp tax or similar tax," we hold that 995 Fifth Avenue is not entitled to an exemption from the gains tax.

A.

We begin our discussion with an analysis of the type of taxes from which Congress intended to exempt qualifying debtors when it enacted 11 U.S.C. § 1146(c). Starting with the text, section 1146(c) provides:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

The Bankruptcy Code supplies no definitions for the terms "stamp tax" or "similar tax." Thus, we must look to the legislative history for assistance in determining what Congress meant by the phrase "stamp tax or similar tax." This history, however, provides limited guidance.

Section 1146(c), enacted as part of Title 11 and the general revision of the federal bankruptcy laws in 1978, was derived from § 267 of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, ch. 575, § 267, 52 Stat. 840, 902-03 (1938) (repealed in 1979). In essence,

the new provision broadened the scope of the exemption to include taxes "similar" to stamp taxes: whereas § 267 exempted the debtor from "any stamp taxes now or hereafter imposed," § 1146(c) provides exemption from "any law imposing a stamp tax *or similar tax*" (emphasis added).[2] The legislative history surrounding the enactment of § 1146(c) does not illuminate what Congress meant when it added the words "or similar tax."

Similarly, there is no relevant legislative history to shed light on Congressional intent behind the enactment of the earlier exemption provision, § 267, which was part of the Chandler Act of 1938. Section 267 greatly changed the wording of its precursor provision, § 77B(f) of the Bankruptcy Act, as amended by the Act of June 7, 1934, ch. 424, § 77B(f), 48 Stat. 911, 919 (1934) (amended in 1938). Section 267 used general language to expand an exemption that had shielded qualified debtors from federal stamp taxes only into one that shielded such debtors from state stamp taxes as well. *See* 11 Harold Remington, A Treatise on the Bankruptcy Law of the United States § 4654 (Kenneth A. Hayes, ed., rev. 1961).

Section 77B(f), the original source of the stamp tax exemption, was added to the Bankruptcy Act by the Act of June 7, 1934, and represented Congress's first effort to provide for the reorganization of corporations in bankruptcy. 1 Harold Remington & James A. Henderson,

---

2 The report of the House Judiciary Committee stated that "[s]ection 1146(c) of title 11 broadens the exemption to any stamp or similar tax." H.R. Rep. No. 595, 95th Cong., 1st Sess. 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6238. We disagree with the district court to the extent it concluded that this statement reflects Congress's intent that the words "stamp or similar tax" be read broadly to accord greater tax relief for debtors. Instead, we regard this statement as a simple declaration that the new provision, § 1146(c), enlarges the former exemption under § 267 to include taxes similar to stamp taxes.

A Treatise on the Bankruptcy Law of the United States § 10 (5th ed. 1950). By its terms, § 77B(f) provided debtors with exemptions from only specific federal stamp taxes on the issuance and transfer of stock and bonds and on conveyances of realty. One of the purposes of § 77B(f) was to exempt the debtor from the payment of federal stamp tax on new securities issued pursuant to a plan of reorganization that required the debtor to modify the terms of outstanding securities for which stamp tax had already been paid.[3] *See* S. Rep. No. 482, 73rd Cong., 2d Sess. 4 (1934). In sum, although the legislative history shows that the scope of the § 1146(c) tax exemption has expanded since its original enactment in 1934, it fails to indicate whether the New York gains tax qualifies as a "stamp tax or similar tax."

Absent more explicit guidance from either the text or the legislative history, we must interpret the words used by Congress in accordance with "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Dictionaries represent one source of such common meaning. *See, e.g., United States v. Adames*, 901 F.2d 11, 12 (2d Cir. 1990). Black's Law Dictionary 1259 (5th ed. 1979) defines "stamp tax" as the "cost of stamps which are required to be affixed to legal documents such as deeds, certificates, and the like." The definition also contains a cross-reference to "[d]ocumentary stamp," which Black's defines as "[s]tamp required by federal (prior to 1968) and state law to be affixed to deeds and other documents of transfer before they may be recorded, the cost of which is generally governed by the consideration recited in the document." This

---

3 These stamp taxes were repealed by the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 401(b), 79 Stat. 148 (1965), effective January 1, 1968.

definition indicates that there are at least two attributes to a stamp tax, as that term is commonly understood: the tax must be paid prior to recordation and the amount due is generally governed by the consideration provided in the instrument.

The common meaning of the term "stamp tax" can also be ascertained by examining the attributes of typical stamp taxes. We therefore agree with the district court insofar as it identified several of the essential attributes of a stamp tax, in reliance on *Lee v. Bickell*, 292 U.S. 415, 417 (1934) and *Texaco, Inc. v. United States*, 624 F.2d 20, 21-22 (5th Cir. 1980). According to the district court, all stamp taxes (1) are imposed only at the time of transfer or sale of the item at issue; (2) impose an amount due that is determined by the consideration recited in the instrument of transfer; and (3) must be paid as a prerequisite to recording.

Based on the characteristics of several taxes that would undoubtedly be considered a "stamp tax or similar tax" within the meaning of § 1146(c), we believe there are several additional essential elements of all such taxes. One such element is that the tax rate, imposed by a stamp or similar tax, is a relatively small percentage of the consideration for the underlying transfer. We first consider the stamp taxes discussed in the federal cases relied upon by the district court. The Florida documentary stamp tax at issue in *Lee v. Bickell*, 292 U.S. 415 (1934), imposed a tax on the sale and transfer of securities of 10 cents on each $100.00 of par or face value. *See Lee* at 418 n.*. Effectively, this Florida tax imposed a tax rate of 1/10 of one percent of par or face value. In *Texaco, Inc. v. United States*, 624 F.2d 20, 21 (5th Cir. 1980), the documentary stamp tax that the taxpayers sought to avoid, section 4361 of the Internal Revenue Code of 1954, ch.736, § 4361,

68A Stat. 3, 520 (1954) (repealed in 1968) imposed a tax on the sale or transfer of realty of approximately 55 cents per $500 of consideration or value of the property interest. The resultant tax rate was slightly more than 1/10 of one percent of the consideration or value.[4]

Like the low rates imposed by these two stamp taxes, several modern state documentary transfer taxes, which we regard as similar to stamp taxes, also impose low tax rates. Vermont has a property transfer tax, Vt. Stat. Ann. tit. 32, § 9602 (1981), imposed on the transfer of real property by deed, at a rate of 5/10 of one percent of the value of the property. The tax is imposed when the deed is delivered to the town clerk for recording, Vt. Stat. Ann. tit. 32, § 9605 (1981), and compliance with the provisions of the property transfer tax is a prerequisite to recording. Vt. Stat. Ann. tit. 32, § 9608 (Supp. 1991). Connecticut terms its property transfer tax the Real Estate Conveyance Tax. Conn. Gen. Stat. Ann. § 12-494 (West Supp. 1991). The tax rate ranges from 55/100 of one percent up to 1 percent of the consideration depending on whether the property is residential and whether its value exceeds $800,000. *Id.* The transferor is liable for the tax, Conn. Gen. Stat. Ann. § 12-495 (West 1983), and deeds subject to the tax can not be recorded unless the tax is paid. Conn. Gen. Stat. Ann. § 12-497 (West Supp. 1991). New York has a similar tax, the Real Estate Transfer Tax, N.Y. Tax Law § 1402 & 1402-a (McKinney Supp. 1992). It imposes a tax on deeds of $2 for every $500 of consideration or

4 Note that this tax provision, § 4361, contains a cross-reference to section 4382 of the Internal Revenue Code of 1954. Section 4382, an exemption provision, refers to the Bankruptcy Act, largely tracks the language of § 267, and exempts debtors from this stamp tax on transactions undertaken pursuant to a plan of reorganization. Thus, the stamp tax imposed by § 4361 certainly was a stamp tax from which Congress intended qualified debtors to be exempt.

value, yielding a tax rate of 4/10 of one percent. N.Y. Tax Law § 1402 (McKinney Supp. 1992). Like the other documentary transfer taxes, the transfer tax must be paid prior to recordation. N.Y. Tax Law § 1410(b) (McKinney Supp. 1992). The grantor is liable for payment of the tax, but if he fails to pay it the grantee becomes liable. N.Y. Tax Law § 1404(a) (McKinney Supp. 1992). The New York scheme also imposes an additional tax on the conveyance of residential property when the consideration is $1 million or more at one percent of the consideration; the grantee is generally liable for this additional tax. N.Y. Tax Law § 1402-a (McKinney Supp. 1992). The foregoing examples of stamp and documentary transfer taxes show that an essential characteristic of these taxes is that they are calculated using a low tax rate—typically about one percent or less—multiplied by either the par value of the security, the consideration in the deed, or the value of the property that is the subject of the transaction.[5]

Finally, we add one more essential characteristic of stamp taxes to those identified by the district court. As stated in *In re Jacoby-Bender, Inc.*, 40 B.R. 10, 15 (Bankr. E.D.N.Y. 1984), where the bankruptcy court held that the New York gains tax is not a stamp or similar tax within the meaning of 11 U.S.C. 1146(c), stamp taxes are imposed irrespective of whether the transfer resulted in a gain or loss to the transferor. All of the stamp taxes and real estate transfer taxes discussed above never even touch on whether the underlying transaction resulted in a gain or loss to the transferor.

---

5 We note that this analysis is consistent with our decision in *In re Jacoby-Bender, Inc.*, 758 F.2d 840 (2d Cir. 1985), in which we found that 11 U.S.C. § 1146(c) (1982) exempted the debtor from payment of the New York City Real Property Transfer Tax, New York, N.Y. Admin. Code § II46-2.0 (1984); at that time the New York City tax imposed a maximum tax rate of two percent.

In sum, we believe that all stamp or similar taxes as stated in 11 U.S.C. § 1146(c) share the following common elements: (1) they are imposed only at the time of transfer or sale of the item at issue; (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is a relatively small percentage of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed a gain or suffered a loss on the underlying sale or transfer; and (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording. We next turn to the New York gains tax to determine whether it shares those attributes common to all stamp or similar taxes.

B.

Section 1441, contained in Article 31-B of New York Tax Law provides:

> A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

N.Y. Tax Law § 1441 (McKinney 1987). Gain is defined for the purposes of Article 31-B as:

> the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

N.Y. Tax Law § 1440.3 (McKinney 1987). Under the version of the statute in force at the time of the sale of the Stanhope Hotel, the transferor was required to pay the tax

on the date of transfer.[6] N.Y. Tax Law § 1442 (McKinney 1987). Transactions that are exempt from the tax include those for which the consideration is less than one million dollars and those in which the real property that is the subject of the transfer is the residence of the transferor. N.Y. Tax Law § 1443 (McKinney 1987 & Supp. 1992). Under N.Y. Tax Law § 1447.1(f)(1) (McKinney 1987), recording is prohibited unless the ministerial requirements of the act have been complied with and any tax due has been paid. *See also* N.Y. Real Property Law § 333.1-f (McKinney 1987) (prohibiting recording officer from recording unless the provisions of § 1447.1(f) are satisfied).

Our analysis of the essential characteristics of stamp or similar taxes indicates that although the New York gains tax bears some resemblance to a stamp tax, it is not a stamp or similar tax within the meaning of 11 U.S.C § 1146(a). As Fifth Avenue correctly points out, like a stamp tax, the gains tax is imposed at the time of transfer and payment, if due, must be made prior to recordation. But there the resemblance ends.

First, and most important, New York gains tax liability is always contingent on the profitability of the underlying transaction. If the transaction yields no gain, there is no tax due. The fact that "gain," as calculated under the gains tax, does not take into account certain development costs in no way alters this core attribute of the gains tax. Stamp taxes and documentary transfer taxes, by contrast, are always imposed irrespective of the existence of gain or profit; the tax liability arises solely from the act of transferring property or securities.

---

6 The specifics regarding payment of and liability for the tax have since been somewhat modified. *See* N.Y. Tax Law §§ 1440.9, 1442(a) & 1447.3(a) (McKinney 1987 & Supp. 1992).

Second, under the gains tax, the consideration for the sale (or some proxy thereof as set forth in N.Y. Tax Law § 1440 (McKinney 1987 & Supp. 1992)) is not determinative of the amount due under the gains tax. Instead, the consideration is used only as a means to measure the gain accruing to the transferor as a result of the transfer. It is the gain, albeit as defined by the provisions of the gains tax, that provides the key figure for determination of the amount owed under the tax. The amount due under a stamp or similar tax hinges on the consideration for the transferred item.

Third, the tax rate provided in the New York gains tax, at 10 percent of the gain, greatly exceeds the tax rate used in any stamp tax or documentary transfer tax. Stamp and documentary transfer taxes impose a low tax rate, typically about one percent or less of the consideration for the underlying transfer. These three important differences between the New York gains tax and stamp and documentary transfer taxes lead us to conclude that the New York gains tax is not a "stamp tax or similar tax" within the meaning of 11 U.S.C § 1146(c).

Finally, we note that Fifth Avenue provides several rationales in support of its contention that the gains tax cannot be characterized as an income tax. For example, Fifth Avenue reasons that the gains tax is not a form of income tax because it does not allow a taxpayer to offset losses against gains in calculating net income generated by transactions completed over a specific period of time. This contention, however, misses the point: the relevant issue is not whether the gains tax can be pigeonholed as an income tax, but whether it represents a stamp or similar tax within the meaning of § 1146(c). For the reasons set forth above, we believe it does not and thus Fifth Avenue is not entitled to an exemption from the New York

gains tax. Thus, we reverse the order of the district court insofar as it directed New York to refund gains tax paid by Fifth Avenue.

Affirmed in part and reversed in part.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 416—August Term, 1991

(Argued October 28, 1991 Decided April 13, 1992)

Docket No. 91-5038

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiff-Appellee,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, as Commissioner of Taxation and Finance; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

Before:

OAKES, *Chief Judge*,
FEINBERG and ALTIMARI, *Circuit Judges*.

The New York State Department of Taxation and Finance, James W. Wetzler, as New York Commissioner of Taxation and Finance, and Edward V. Regan, as Comptroller of the State of New York, appeal from an order of the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*) affirming the opinion and order of the Bankruptcy Court (Tina L. Brozman, *Bankruptcy Court Judge*). The Bankruptcy Court granted 995 Fifth Avenue Associates, L.P.'s motion for summary judgment and ordered the New York State Department of Taxation and Finance to refund New York Gains Tax, N.Y. Tax Law § 1441 (McKinney 1987) paid by 995 Fifth Avenue Associates, L.P.

Affirmed in part and reversed in part.

DAVID S. COOK, Senior Attorney, Attorney General's Office, State of New York, New York, NY (Robert Abrams, Attorney General, Frederic L. Lieberman, Marcie S. Mintz, Assistant Attorneys General, of counsel), *for Defendants-Appellants*.

JOSHUA J. ANGEL, New York, NY (Leonard H. Gerson, Ira R. Abel, Angel & Frankel, P.C., of counsel), *for Plaintiff-Appellee*.

OAKES, *Chief Judge*:

This appeal requires us to decide whether the Eleventh Amendment bars a debtor's suit to recover taxes paid to the State of New York, and whether 11 U.S.C. § 1146(c)

(1988) exempts the debtor from payment of the New York gains tax on the transfer of property, N.Y. Tax Law § 1441 (McKinney 1987). The United States Bankruptcy Court for the Southern District of New York, Tina L. Brozman, *Bankruptcy Court Judge*, found that the New York State Department of Taxation and Finance, James W. Wetzler, as New York Commissioner of Taxation and Finance, and Edward V. Regan, as Comptroller of the State of New York (collectively "State of New York," "New York," or "appellant") waived the State of New York's immunity from suit by filing a proof of claim in the bankruptcy proceeding, found that the debtor was exempt from the gains tax, and accordingly ordered New York to refund the gains tax paid by the debtor, 995 Fifth Avenue Associates, L.P. ("Fifth Avenue"). New York appealed to the United States District Court for the Southern District of New York. Leonard B. Sand, *District Judge*, affirmed the opinion and order of the bankruptcy court and the State of New York now appeals.

For the reasons set forth below, we affirm in part and reverse in part.

BACKGROUND

The relevant facts are not in dispute. The debtor, Fifth Avenue, operated the Stanhope Hotel. It filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in February of 1988 and thereafter continued to operate the hotel as debtor in possession. Pursuant to a plan of reorganization, the bankruptcy court authorized the sale of Fifth Avenue's interest in the hotel at a price of $76 million. The court's order specifically declared that, because the sale was part of a plan of reorganization, § 1146(c) rendered the sale exempt from all transfer taxes.

On January 12, 1989, the day before the scheduled closing, in accordance with N. Y. Tax Law § 1447 (McKinney 1987), New York issued a Tentative Assessment and Return imposing a gains tax of $2,608,603.80 on the sale of the property. New York subsequently denied the debtor's request for an exemption from the tax under 11 U.S.C. § 1146(c). Because New York law prohibits recordation of the deed without payment of tax due under a Tentative Assessment and Return, Fifth Avenue could not close the sale as scheduled without paying the gains tax. Faced with this dilemma, the debtor paid the tax under protest, enabling it to record the deed and close the sale.

In March 1989, the debtor brought an adversary proceeding in bankruptcy court against the State of New York, seeking, *inter alia*, a declaration that § 1146(c) exempted the debtor from the gains tax, and an order directing that the payment made to New York be refunded. Some months later, after the bankruptcy court heard oral argument in the proceeding, the State of New York filed an administrative expense claim for gains tax liability of $2,137,496.76, an amount in addition to the approximately $2.6 million already imposed by the state and paid by the debtor.

The bankruptcy court found that the debtor's sale was exempt from the gains tax under § 1146(c). In response to the State of New York's Eleventh Amendment immunity argument, the bankruptcy court held that pursuant to 11 U.S.C. § 106(a) (1988), New York had waived its Eleventh Amendment immunity by filing the administrative expense claim for additional gains tax. The district court affirmed the decision and order of the bankruptcy court.

DISCUSSION

I. Eleventh Amendment Immunity

Appellant argues that the Eleventh Amendment barred both the bankruptcy court and the district court from considering whether the debtor was exempt from payment of the New York gains tax. The Eleventh Amendment, where applicable, deprives a federal court of jurisdiction. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Thus, prior to addressing the merits of this case we must first determine whether Eleventh Amendment immunity bars our jurisdiction. We hold that it does not.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The reach of the amendment was judicially expanded beyond its text in *Hans v. Louisiana*, 134 U.S. 1 (1890), to bar citizens from suing their own states in federal court. The Supreme Court has also consistently held that federal suits by private citizens that seek damages to be paid out of the state treasury are barred by the Eleventh Amendment. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Despite this general bar to suits against states created by the Eleventh Amendment, there are two well-established ways to provide judicial power over such cases: abrogation of immunity by Congress and waiver of immunity by a state. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). A purported Con-

gressional abrogation of Eleventh Amendment immunity is not effective, however, unless it meets a two-part test set forth by the Court. First, Congress must make its intent to abrogate Eleventh Amendment immunity "unmistakably clear." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Second, the constitutional provision under which Congress legislates its purported abrogation must grant Congress the power to override the Eleventh Amendment. *Union Gas*, 491 U.S. at 13-23. Abrogation of Eleventh Amendment immunity typically occurs when Congress enacts a new federal statutory cause of action. *See, e.g. Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (Eleventh Amendment immunity abrogated for suit to recover damages from the State for gender-based employment discrimination under Title VII); *Union Gas Co.*, 491 U.S. at 23 (Eleventh Amendment immunity abrogated for suit to recover costs from the State for environmental clean-up under CERCLA).

Waiver of Eleventh Amendment immunity, in contrast to abrogation, is not hinged to a specific federal statutory cause of action. Instead, it is triggered by some affirmative activity of a state, such as a state's enactment of legislation by which it consents to be sued in federal court, *see, e.g., Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307-09 (1990), and, as here, a state's participation in litigation in federal court. In *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), for example, the State of Rhode Island was deemed to have waived its Eleventh Amendment immunity by intervening in a case as a claimant of a fund. And the Court in *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947), held that where the State of New Jersey filed a claim against a fund in bankruptcy court, in a case where no judgment was sought against the

State, the State waived its immunity. Thus, as the district court noted, it is long-established that a state's participation in a bankruptcy proceeding can trigger a waiver of immunity.

The State of New York does not take issue with this general principle. Rather, it argues that the provision of the Bankruptcy Code under which the bankruptcy court deemed the State to have waived its Eleventh Amendment immunity—11 U.S.C. § 106(a)—represents an abrogation provision, not a waiver scheme. As an abrogation provision, New York contends, § 106(a) is unconstitutional because Congress lacks the authority to abrogate sovereign immunity when enacting legislation under the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. We disagree with New York's characterization of § 106(a).

Section 106(a) provides:

> A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

The plain meaning of these words obviously reflects Congress's intent to provide a *waiver* of immunity where "a governmental unit" files a claim in the bankruptcy court. The scope of the waiver, of course, remains limited; upon filing a claim the governmental unit subjects itself only to claims that arose from the same transaction or occurrence that formed the basis of the governmental unit's claim. Our conclusion derives further support from two recent cases where the Supreme Court, albeit in dicta, stated that § 106(a) provides for a limited waiver of immunity. *See Hoffman v. Connecticut Income Maint.*

Dept., 492 U.S. 96, 101-02 (1989); *U.S. v. Nordic Village, Inc.*, No. 90-1629, slip op. at 4-6 (U.S. Feb. 25, 1992).

In addition, Congress did not use the language of abrogation in § 106(a). Compare, for example, the language used by Congress in *Union Gas*, where the Court held that Congress abrogated Eleventh Amendment immunity in making states liable for cleanup costs under CERCLA. *Union Gas*, 491 U.S. at 13. In the provisions there at issue, Congress stated that any "person," "owner[,] and operator" shall be liable. 42 U.S.C. § 9607(a) (1988). Congress went on to include states in the definition of a "person," 42 U.S.C. § 9601(21), and except in very limited situations Congress provided that states fall within the meaning of the term "owner or operator." *See* 42 U.S.C. § 9601(20)(D). Thus, CERCLA contains the language of abrogation by clearly stating that states can be liable for cleanup costs. Section 106(a) contains no similar statement regarding the liability of states for a specific class of damages.

Not only is the wording of § 106(a) different from language aimed at a general override of immunity, but this provision provides for suits against states by a route that differs markedly from the typical abrogation context. Typically, abrogation occurs when Congress has enacted a cause of action generally and seeks to render states, in particular, liable for damages "along with everyone else." *Union Gas*, 491 U.S. at 8. Section 106(a), however, renders a state liable to suit only when the state participates in a bankruptcy proceeding by filing a claim.

Thus, § 106(a) creates a waiver scheme; it is not an abrogation provision. Indeed, the section largely partakes of the waiver by participation doctrine that received the Supreme Court's imprimatur in *Gardner*, 329 U.S. at 574.

Because we find that § 106(a) specifies when a state has waived its Eleventh Amendment immunity, we need not address appellant's contention that Congress lacks the authority to abrogate sovereign immunity when enacting legislation under the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4.

Next, we consider the validity of the purported waiver of Eleventh Amendment immunity under § 106(a). We note at the outset that, like the First Circuit, we see no constitutional barrier to a waiver of Eleventh Amendment immunity as provided in § 106(a). In *WJM, Inc. v. Massachusetts Dept. of Public Welfare*, 840 F.2d 996, 1002-005 (1st Cir. 1988), the court held that Congress possesses the authority to condition a state's participation in a bankruptcy proceeding on its waiver of Eleventh Amendment immunity. The court in *WJM* relied in part on *Atascadero*, where the Court considered whether states can be sued for damages under a Congressionally-created cause of action. In *Atascadero*, the Court determined that the Congressional legislation in question fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. After citing this language, the *WJM* court reasoned:

> The logical inference from this and other language in *Atascadero*, however, is that Congress *may* effectively condition a state's participation in a federal program on a state's consent to federal jurisdiction, so long as Congress manifests a clear intent to this effect.

WJM, 840 F.2d at 1003. We agree with the First Circuit's analysis.

Our conclusion regarding Congressional authority, however, does not end the inquiry, because we will only give effect to Congressional legislation that purports to condition state participation in litigation on a state's waiver of Eleventh Amendment immunity when Congress "manifest[s] a clear intent" to do so. *Atascadero*, 473 U.S. at 247. This requirement is analogous to the test the Court applies to determine the validity of a state's waiver of Eleventh Amendment immunity by state legislation. In that context, "[t]he Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Feeney*, 495 U.S. at 299 (quoting *Atascadero*, 473 U.S. at 239-40 and *Edelman*, 415 U.S. at 673). We discern no substantive difference between the test for a Congressional waiver scheme, as set forth in *Atascadero*, and the test for a waiver by state legislation, as applied in *Feeney*. Thus, we must again turn to the language of § 106(a) to determine whether it plainly requires a waiver of Eleventh Amendment immunity and "leave[s] no room for any other reasonable construction." *Atascadero*, 473 U.S. at 240.

Appellant argues that no such waiver of Eleventh Amendment immunity is implicated by § 106(a) because, by its terms, it fails to mention the Eleventh Amendment. Explicit mention of the Eleventh Amendment, however, has never been a requirement for waiver of immunity. For example, in *Feeney*, the Court found that by statute the states of New York and New Jersey had waived their Eleventh Amendment immunity, but nowhere did the statutory provisions mention the Eleventh Amendment. *Feeney*, 495 U.S. at 303, 306-09. *See also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, *J.*, concurring)

(statutory text may override Eleventh Amendment immunity without explicit reference to either state sovereign immunity or the Eleventh Amendment). Similarly, the text's failure specifically to mention states is irrelevant: § 106(a) uses the term "governmental unit," which the Bankruptcy Code defines in 11 U.S.C. § 101(26) (1988) as including a "State." To hold otherwise would ignore the fact that Congress routinely expresses its intent with statutes drafted with definitional cross-references.[1] Accordingly, we find that § 106(a) plainly expresses Congress's intent to provide for a limited waiver of Eleventh Amendment immunity and "leave[s] no room for any other reasonable construction." *Atascadero*, 473 U.S. at 240.

Applying § 106(a) to the facts of this case, we find that the State of New York, by filing an administrative expense claim for $2,137,496.76, waived its Eleventh Amendment immunity with respect to the $2,608,603.80 million in gains tax paid by the debtor. As we have stated, § 106(a) provides for waiver of Eleventh Amendment immunity from any claim against the state "that arose out of the same transaction or occurrence out of which such governmental unit's claim arose." Here, the State's administrative expense claim arose from additional gains tax levied on the sale of the Stanhope Hotel. Fifth Avenue's claim against the State for a refund also arose from gains tax imposed on the sale of the Stanhope Hotel. Thus, appellee's claim for a tax refund arose from the same transaction or occurrence—the sale of the Stanhope Hotel—as the State's claim for additional taxes. Accord-

1 The State of New York also argues that § 106(a) is insufficiently clear because it does not mention the filing of a proof of claim. We do not believe this fact renders Congress's intent unclear, because the only reasonable construction of § 106(a) is that waiver will arise only if a claim is actually filed.

ingly, the Eleventh Amendment does not bar us from reaching the merits of this case.

II. Whether the Gains Tax is a "Stamp Tax or Similar Tax"

We now consider whether the New York gains tax, N.Y. Tax Law § 1441 (McKinney 1987), is a "stamp tax or similar tax" within the meaning of 11 U.S.C. § 1146(c). Because the New York gains tax is not a "stamp tax or similar tax," we hold that 995 Fifth Avenue is not entitled to an exemption from the gains tax.

A.

We begin our discussion with an analysis of the type of taxes from which Congress intended to exempt qualifying debtors when it enacted 11 U.S.C. § 1146(c). Starting with the text, section 1146(c) provides:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

The Bankruptcy Code supplies no definitions for the terms "stamp tax" or "similar tax." Thus, we must look to the legislative history for assistance in determining what Congress meant by the phrase "stamp tax or similar tax." This history, however, provides limited guidance.

Section 1146(c), enacted as part of Title 11 and the general revision of the federal bankruptcy laws in 1978, was derived from § 267 of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, ch. 575, § 267, 52

Stat. 840, 902-03 (1938) (repealed in 1979). In essence, the new provision broadened the scope of the exemption to include taxes "similar" to stamp taxes: whereas § 267 exempted the debtor from "any stamp taxes now or hereafter imposed," § 1146(c) provides exemption from "any law imposing a stamp tax *or similar tax*" (emphasis added).[2] The legislative history surrounding the enactment of § 1146(c) does not illuminate what Congress meant when it added the words "or similar tax."

Similarly, there is no relevant legislative history to shed light on Congressional intent behind the enactment of the earlier exemption provision, § 267, which was part of the Chandler Act of 1938. Section 267 greatly changed the wording of its precursor provision, § 77B(f) of the Bankruptcy Act, as amended by the Act of June 7, 1934, ch. 424, § 77B(f), 48 Stat. 911, 919 (1934) (amended in 1938). Section 267 used general language to expand an exemption that had shielded qualified debtors from federal stamp taxes only into one that shielded such debtors from state stamp taxes as well. *See* 11 Harold Remington, A Treatise on the Bankruptcy Law of the United States § 4654 (Kenneth A. Hayes, ed., rev. 1961).

Section 77B(f), the original source of the stamp tax exemption, was added to the Bankruptcy Act by the Act of June 7, 1934, and represented Congress's first effort to provide for the reorganization of corporations in

---

2 The report of the House Judiciary Committee stated that "[s]ection 1146(c) of title 11 broadens the exemption to any stamp or similar tax." H.R. Rep. No. 595, 95th Cong., 1st Sess. 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6238. We disagree with the district court to the extent it concluded that this statement reflects Congress's intent that the words "stamp or similar tax" be read broadly to accord greater tax relief for debtors. Instead, we regard this statement as a simple declaration that the new provision, § 1146(c), enlarges the former exemption under § 267 to include taxes similar to stamp taxes.

bankruptcy. 1 Harold Remington & James A. Henderson, A Treatise on the Bankruptcy Law of the United States § 10 (5th ed. 1950). By its terms, § 77B(f) provided debtors with exemptions from only specific federal stamp taxes on the issuance and transfer of stock and bonds and on conveyances of realty. One of the purposes of § 77B(f) was to exempt the debtor from the payment of federal stamp tax on new securities issued pursuant to a plan of reorganization that required the debtor to modify the terms of outstanding securities for which stamp tax had already been paid.[3] *See* S. Rep. No. 482, 73rd Cong., 2d Sess. 4 (1934). In sum, although the legislative history shows that the scope of the § 1146(c) tax exemption has expanded since its original enactment in 1934, it fails to indicate whether the New York gains tax qualifies as a "stamp tax or similar tax."

Absent more explicit guidance from either the text or the legislative history, we must interpret the words used by Congress in accordance with "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Dictionaries represent one source of such common meaning. *See, e.g., United States v. Adames*, 901 F.2d 11, 12 (2d Cir. 1990). Black's Law Dictionary 1259 (5th ed. 1979) defines "stamp tax" as the "cost of stamps which are required to be affixed to legal documents such as deeds, certificates, and the like." The definition also contains a cross-reference to "[d]ocumentary stamp," which Black's defines as "[s]tamp required by federal (prior to 1968) and state law to be affixed to deeds and other documents of transfer before they may be recorded, the cost of which is generally gov-

---

3 These stamp taxes were repealed by the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 401(b), 79 Stat. 148 (1965), effective January 1, 1968.

erned by the consideration recited in the document." This definition indicates that there are at least two attributes to a stamp tax, as that term is commonly understood: the tax must be paid prior to recordation and the amount due is generally governed by the consideration provided in the instrument.

The common meaning of the term "stamp tax" can also be ascertained by examining the attributes of typical stamp taxes. We therefore agree with the district court insofar as it identified several of the essential attributes of a stamp tax, in reliance on *Lee v. Bickell*, 292 U.S. 415, 417 (1934) and *Texaco, Inc. v. United States*, 624 F.2d 20, 21-22 (5th Cir. 1980). According to the district court, all stamp taxes (1) are imposed only at the time of transfer or sale of the item at issue; (2) impose an amount due that is determined by the consideration recited in the instrument of transfer; and (3) must be paid as a prerequisite to recording.

Based on the characteristics of several taxes that would undoubtedly be considered a "stamp tax or similar tax" within the meaning of § 1146(c), we believe there are several additional essential elements of all such taxes. One such element is that the tax rate, imposed by a stamp or similar tax, is one percent or even less of the consideration for the underlying transfer. We first consider the stamp taxes discussed in the federal cases relied upon by the district court. The Florida documentary stamp tax at issue in *Lee v. Bickel*, 292 U.S. 415 (1934), imposed a tax on the sale and transfer of securities of 10 cents on each $100.00 of par or face value. *See Lee* at 418 n. *. Effectively, this Florida tax imposed a tax rate of 1/10 of one percent of par or face value. In *Texaco, Inc. v. United States*, 624 F.2d 20, 21 (5th Cir. 1980), the documentary stamp tax that the taxpayers sought to avoid, section 4361

of the Internal Revenue Code of 1954, ch.736, § 4361, 68A Stat. 3, 520 (1954) (repealed in 1968) imposed a tax on the sale or transfer of realty of approximately 55 cents per $500 of consideration or value of the property interest. The resultant tax rate was slightly more than 1/10 of one percent of the consideration or value.[4]

Like the low rates imposed by these two stamp taxes, several modern state documentary transfer taxes, which we regard as similar to stamp taxes, also impose low tax rates. Vermont has a property transfer tax, Vt. Stat. Ann. tit. 32, § 9602 (1981), imposed on the transfer of real property by deed, at a rate of 5/10 of one percent of the value of the property. The tax is imposed when the deed is delivered to the town clerk for recording, Vt. Stat. Ann. tit. 32, § 9605 (1981), and compliance with the provisions of the property transfer tax is a prerequisite to recording. Vt. Stat. Ann. tit. 32, § 9608 (Supp. 1991). Connecticut terms its property transfer tax the Real Estate Conveyance Tax. Conn. Gen. Stat. Ann. § 12-494 (West Supp. 1991). The tax rate ranges from 55/100 of one percent up to 1 percent of the consideration depending on whether the property is residential and whether its value exceeds $800,000. *Id.* The transferor is liable for the tax, Conn. Gen. Stat. Ann. § 12-495 (West 1983), and deeds subject to the tax can not be recorded unless the tax is paid. Conn. Gen. Stat. Ann. § 12-497 (West Supp. 1991). New York has a similar tax, the Real Estate Transfer Tax, N.Y. Tax Law § 1402 & 1402-a (McKinney Supp. 1992). It imposes

---

4 Note that this tax provision, § 4361, contains a cross-reference to section 4382 of the Internal Revenue Code of 1954. Section 4382, an exemption provision, refers to the Bankruptcy Act, largely tracks the language of § 267, and exempts debtors from this stamp tax on transactions undertaken pursuant to a plan of reorganization. Thus, the stamp tax imposed by § 4361 certainly was a stamp tax from which Congress intended qualified debtors to be exempt.

a tax on deeds of $2 for every $500 of consideration or value, yielding a tax rate of 4/10 of one percent. N.Y. Tax Law § 1402 (McKinney Supp. 1992). Like the other documentary transfer taxes, the transfer tax must be paid prior to recordation. N.Y. Tax Law § 1410(b) (McKinney Supp. 1992). The grantor is liable for payment of the tax, but if he fails to pay it the grantee becomes liable. N.Y. Tax Law § 1404(a) (McKinney Supp. 1992). The New York scheme also imposes an additional tax on the conveyance of residential property when the consideration is $1 million or more at one percent of the consideration; the grantee is generally liable for this additional tax. N.Y. Tax Law § 1402-a (McKinney Supp. 1992). The foregoing examples of stamp and documentary transfer taxes show that an essential characteristic of these taxes is that they are calculated using a low tax rate of about one percent or less, multiplied by either the par value of the security, the consideration in the deed, or the value of the property that is the subject of the transaction.

Finally, we add one more essential characteristic of stamp taxes to those identified by the district court. As stated in *In re Jacoby-Bender, Inc.*, 40 B.R. 10, 15 (Bankr. E.D.N.Y. 1984), where the bankruptcy court held that the New York gains tax is not a stamp or similar tax within the meaning of 11 U.S.C. 1146(c), stamp taxes are imposed irrespective of whether the transfer resulted in a gain or loss to the transferor. All of the stamp taxes and real estate transfer taxes discussed above never even touch on whether the underlying transaction resulted in a gain or loss to the transferor.

In sum, we believe that all stamp or similar taxes as stated in 11 U.S.C. § 1146(c) share the following common elements: (1) they are imposed only at the time of transfer or sale of the item at issue; (2) the amount due is

determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is relatively low—about one percent or less of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed a gain or suffered a loss on the underlying sale or transfer; and (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording. We next turn to the New York gains tax to determine whether it shares those attributes common to all stamp or similar taxes.

B.

Section 1441, contained in Article 31-B of New York Tax Law provides:

> A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

N.Y. Tax Law § 1441 (McKinney 1987). Gain is defined for the purposes of Article 31-B as:

> the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

N.Y. Tax Law § 1440.3 (McKinney 1987). Under the version of the statute in force at the time of the sale of the Stanhope Hotel, the transferor was required to pay the tax on the date of transfer.[5] N.Y. Tax Law § 1442 (McKinney 1987). Transactions that are exempt from the tax include those for which the consideration is less than one million

---

5 The specifics regarding payment of and liability for the tax have since been somewhat modified. *See* N.Y. Tax Law §§ 1440.9, 1442(a) & 1447.3(a) (McKinney 1987 & Supp. 1992).

dollars and those in which the real property that is the subject of the transfer is the residence of the transferor. N.Y. Tax Law § 1443 (McKinney 1987 & Supp. 1992). Under N.Y. Tax Law § 1447.1(f)(1) (McKinney 1987), recording is prohibited unless the ministerial requirements of the act have been complied with and any tax due has been paid. *See also* N.Y. Real Property Law § 333.1-f (McKinney 1987) (prohibiting recording officer from recording unless the provisions of § 1447.1(f) are satisfied).

Our analysis of the essential characteristics of stamp or similar taxes indicates that although the New York gains tax bears some resemblance to a stamp tax, it is not a stamp or similar tax within the meaning of 11 U.S.C § 1146(a). As Fifth Avenue correctly points out, like a stamp tax, the gains tax is imposed at the time of transfer and payment, if due, must be made prior to recordation. But there the resemblance ends.

First, and most important, New York gains tax liability is always contingent on the profitability of the underlying transaction. If the transaction yields no gain, there is no tax due. The fact that "gain," as calculated under the gains tax, does not take into account certain development costs in no way alters this core attribute of the gains tax. Stamp taxes and documentary transfer taxes, by contrast, are always imposed irrespective of the existence of gain or profit; the tax liability arises solely from the act of transferring property or securities.

Second, under the gains tax, the consideration for the sale (or some proxy thereof as set forth in N.Y. Tax Law § 1440 (McKinney 1987 & Supp. 1992)) is not determinative of the amount due under the gains tax. Instead, the consideration is used only as a means to measure the gain

accruing to the transferor as a result of the transfer. It is the gain, albeit as defined by the provisions of the gains tax, that provides the key figure for determination of the amount owed under the tax. The amount due under a stamp or similar tax hinges on the consideration for the transferred item.

Third, the tax rate provided in the New York gains tax, at 10 percent of the gain, greatly exceeds the tax rate used in any stamp tax or documentary transfer tax. Stamp and documentary transfer taxes impose a tax rate of about one percent or less of the consideration for the underlying transfer. These three important differences between the New York gains tax and stamp and documentary transfer taxes lead us to conclude that the New York gains tax is not a "stamp tax or similar tax" within the meaning of 11 U.S.C § 1146(c).

Finally, we note that Fifth Avenue provides several rationales in support of its contention that the gains tax cannot be characterized as an income tax. For example, Fifth Avenue reasons that the gains tax is not a form of income tax because it does not allow a taxpayer to offset losses against gains in calculating net income generated by transactions completed over a specific period of time. This contention, however, misses the point: the relevant issue is not whether the gains tax can be pigeonholed as an income tax, but whether it represents a stamp or similar tax within the meaning of § 1146(c). For the reasons set forth above, we believe it does not and thus Fifth Avenue is not entitled to an exemption from the New York gains tax. Thus, we reverse the order of the district court insofar as it directed New York to refund gains tax paid by Fifth Avenue.

Affirmed in part and reversed in part.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 91-5038

FILED APRIL 13, 1992

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of April, one thousand nine hundred and ninety-two.

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

---

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiff-Appellee,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, as Commissioner of Taxation and Finance; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is affirmed in part, reversed in part in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, *Clerk*
By:

/s/ EDWARD J. GUARDARO
Edward J. Guardaro
Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 5744 (LBS)

May 16, 1991

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiffs-Appellees,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JAMES W. WETZLER as Commissioner of Taxation and Finance, and EDWARD V. REGAN as Comptroller of the State of New York,

Defendants-Appellants.

Angel & Frankel, P.C., New York City (Joshua J. Angel, Leonard H. Gerson, Ira R. Abel, of counsel), for plaintiffs-appellees.

Robert Abrams, Attorney General of the State of New York, New York City (Frederic L. Lieberman, David S. Cook, of counsel), for defendants-appellants.

OPINION

SAND, *District Judge*.

This case comes to this Court on appeal from an order of the United States Bankruptcy Court for the Southern District of New York, Hon. Tina L. Brozman. The New York State Department of Taxation and Finance, James W. Wetzler, New York Commissioner of Taxation and Finance and Edward W. Regan, Comptroller of the State of New York (collectively "Appellants") appeal from a decision and order granting the motion for summary judgment made by 995 Fifth Avenue Associates, L.P.'s ("Appellees"). Two issues are presented. First, as a jurisdictional matter, Appellants suggest that the Bankruptcy Court acted outside its powers since the relief granted was barred by the Eleventh Amendment and the doctrine of sovereign immunity. Second, Appellants claim that the Bankruptcy Court decision and order should be reversed as a matter of law for exempting Appellees, under provisions of the Bankruptcy Code, from the payment of certain New York State taxes.

The Bankruptcy Court held that the sale by Appellees of its interest in the Stanhope Hotel ("Stanhope") pursuant to a Chapter 11 plan is exempt, under section 1146(c) of Title 11 of the United States Code, 11 U.S.C. § 1146(c) (1988) ("Bankruptcy Code"), from a ten percent tax imposed on gains derived from the transfer of real property by Article 31-B § 1441 *et seq.* of the New York tax law ("Gains Tax"). The Bankruptcy Court directed Appellants to refund to Appellees the Gains Tax collected in the amount of $2,608,603.80 together with interest. The Bankruptcy Court further held that Appellants had waived their sovereign immunity and Eleventh Amendment rights with respect to all aspects of the Gains Tax through the filing of a proof of claim by the Commissioner of Taxation and Finance of the State of New York, which asserted a tax liability. For the reasons stated below, the decision and order of the Bankruptcy Court are affirmed.

I. FACTS

There is little disagreement on the facts in this case. The Appellees were in the business of operating a hotel and related restaurant and catering facilities known as the Stanhope. The Appellees filed a Chapter 11 petition on February 4, 1988 and continued operating the business as debtors-in-possession. Over the course of the bankruptcy case, the Appellees filed an original and three subsequent amended plans of reorganization (collectively, "the Plan"), all of which contemplated the sale of the Appellees' interest in the Stanhope. On July 20, 1989, the Bankruptcy Court approved the Plan. Shortly thereafter the Stanhope was sold and there was a distribution of funds to the creditors.[1]

Prior to approving the Plan, the Bankruptcy Court issued an order dated November 29, 1988 ("Sale Order"), authorizing the Appellees to sell or assign its interest in the Stanhope for the amount of $76,000,000. The Sale Order declared that the Sale was being made under a plan of reorganization and, pursuant to section 1146(c) of the Bankruptcy Code, would be exempt from any federal, state, or local transfer taxes. The closing of the sale was scheduled for January 13, 1989. On January 12, 1989, pursuant to the pre-transfer audit procedures provided by the New York Tax Law, Appellants issued a Tentative Assessment and Return ("first assessment") imposing a Gains Tax of $2,608,603.80 on the proposed sale and transfer. The Appellees immediately objected to, and were denied by Appellants a reprieve from, the proposed Gains Tax based on section 1146(c) of the Bankruptcy Code. Because state law prohibits recordation of title and transfer in local land records without payment of any tax due, the Appellees paid the Gain Tax under protest to allow the closing to go forward and the deed to be recorded. *See* N.Y. Tax Law § 1447(f) (McKinney 1987).[2]

---

1 There are still some creditors who have yet to be paid under the Plan and any money deposited in Appellee's account as a result of this action will be distributed according to the Plan. *See* transcript of oral argument, dated February 21, 1991 ("tr") at p. 3.

2 In conformance with the Plan where a claim is objected to, as in the case of Appellant's claim, the monies at issue are placed in an escrow account maintained by the Appellees. *See* tr. at 3.

Since Appellees paid the exact amount of Gains Tax charged in the first assessment, Appellants did not file a proof of claim as to that amount. However, Appellants did file two other proofs of claim in the Bankruptcy Court. Appellants first filed a proof of claim on January 29, 1989 for approximately $3 million to recover sales and withholding taxes. None of these taxes are challenged in this action and are not relevant to the Gains Tax question. The second proof of claim, filed on October 23, 1989, which is the only claim at issue in this action, was designated the "Third Amended Administrative Expense Claim" ("Claim 300").[3] This claim is based in part on what the Appellants concluded is an additional Gains Tax liability of $2,137,496.76 over and above the $2,608,603.80 already imposed. Claim 300 was filed after the Bankruptcy Court heard oral argument on the summary judgment motion but before it issued an opinion.

II. DISCUSSION

A. *Eleventh Amendment and Sovereign Immunity*

Appellants allege as a threshold matter that the Eleventh Amendment and the doctrine of sovereign immunity bar the Bankruptcy Court, and this Court, from considering any portion of this case. Since these immunity defenses are jurisdictional in nature, the Court must first consider their validity. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." At its core, this Amendment stands for the fundamental principle that "sovereign immunity limits the grant of judicial authority in Article III" of the Constitution. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Although not explicitly stated by the language in the

---

3 An Administrative Expense Claim is a type of proof of claim which allows a creditor to move ahead of unsecured creditors to a first or second priority.

Amendment, it is a long standing rule that sovereign immunity also bars a citizen from bringing a suit against his or her own State in federal court. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

There are, however, well established exceptions to the reach of the Eleventh Amendment and the doctrine of sovereign immunity. For example, the Supreme Court has held that if a State waives its immunity and consents to suit in a federal court, the Eleventh Amendment does not bar such an action. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883).[4] A State may effectuate a waiver of its constitutional immunity by enacting a state statute or constitutional provision, "or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n. 1 (1985). Waiver by participation occurs when a State engages in a federally sponsored activity in which Congress has made waiver of immunity a pre-condition of state participation. *Id.* at 237. Still, any consent by the state to waive its Eleventh Amendment rights by participating in a federal program requires an unequivocal and clear indication of such an intention. *See Edelman v. Jordon*, 415 U.S. 651, 673 (1974).

The waiver of a State's immunity rights by participation in a bankruptcy proceeding has long been recognized, not only under the Bankruptcy Code, but also under the former Bankruptcy Act. *See Clark v. Barnard*, 108 U.S. 436, 447-48

---

4 Another exception is waiver by abrogation. Congress may override Eleventh Amendment immunity by enacting a statute pursuant to its plenary powers granted by the Constitution. For example, Congress has the authority to abrogate a State's immunity pursuant to Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Legislative power to abrogate is also available pursuant to Article I under the Commerce Clause. *See Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S. Ct. 2273, 2277 (1989). It is unclear whether Congress has the power under the Bankruptcy Clause of Article I to abrogate a State's immunity. In *Hoffman v. Connecticut Dep't of Income Maintenance*, ___ U.S. ___, 109 S. Ct. 2818, 2824 (1989), the Supreme Court declined to address the question since the case was resolved on other grounds. *Id.* at 2824. *See also Union Gas Co.*, 109 S. Ct. at 2277 (if statutory language does not contain clear expression of intent, constitutional questions of Congress's authority to abrogate immunity need not be considered).

(1883). As the Supreme Court has held, "[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Gardner v. New Jersey*, 329 U.S. 565, 574 (1946). In essence, if a State desires to participate in obtaining remaining assets from a bankrupt estate it is subject, as are all the interested parties, to the requirements imposed by the Bankruptcy Court such as bar dates for filing claims and sale orders.

This exception to the Eleventh Amendment and the doctrine of sovereign immunity was codified in section 106(a) of the Bankruptcy Code. Section 106 provides, in pertinent part:

> Waiver of sovereign immunity
>
> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occupance out of which such governmental unit's claim arose.

11 U.S.C. § 106(a) (1988).[5] In clear, concise language, Congress conditioned a state's participation in a specific federal program on the state's consent to federal jurisdiction. If a state chooses to enter the federal government's exclusive bankruptcy preserve—to assert a claim against a debtor's estate—it must file a proof of claim, as required of all parties.[6] *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). Section 106(a) puts the state on notice that the *quid pro quo* for filing a proof of claim is a partial waiver of its sovereign immunity. This forced partial waiver requires only that a state come into the proceeding on equal terms with others.[7]

---

5 A governmental unit is defined to include the "United States; state; [or] [c]ommonwealth" or any "department, agency or instrumentality" thereof." 11 U.S.C. § 101(26) (1988). No party questions that Appellants fall within this definition.

6 The language in Section 106(a) refers to a "claim" which is effected in the context of a bankruptcy proceeding by the filing of a "proof of claim."

7 This case is not unique in that the filing of a proof of claim may effect the waiver of an otherwise secure constitutional right. Most recently in *Grand-*

Once immunity has been waived, the state has subjected itself to any liability it has to the estate relating to the claim and transaction at issue. Section 106(a) "conditions the state's receiv[ing] a distribution from the estate upon waiver of immunity against *any* compulsory counterclaims asserted against it without limit in a bankruptcy proceeding." *In re Willington Convalescent Home, Inc.*, 850 F.2d 50, 54 (2d Cir.1988). *See also* H. R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977). As the Second Circuit concluded, "[A]ccordingly, § 106(a) provides for affirmative recovery, including money judgments." *Id. See also In re Prudential Lines, Inc. v. United States Maritime Administration*, 79 B.R. 167, 180 (Bankr. S.D.N.Y. 1987); *In re Inslaw, Inc.*, 76 B.R. 224, 234 (Bankr. D.D.C. 1987).

Here, there is no disagreement that pursuant to section 106(a) Appellants have waived their immunity defenses as to certain claims involving approximately $3 million of sales and withholding taxes by filing a proof of claim on January 29, 1989. The dispute is over the scope of the immunity waived by Appellants upon the later filing of Claim 300, which charges in part that Appellees' estate owes approximately $2.1 million in additional gains taxes relating to the original Stanhope transaction over and above the approximately $2.6 million already paid. This Court concludes, based on the language in section 106(a), which states in pertinent part that "any claim against such governmental unit . . . that arose out of the same transaction or occurrence out of which such government unit's claim arose," that Appellants have waived their immunity defense as to counterclaims involving all gains tax liability related to the Stanhope transaction. All gains tax liability includes both the original 2.6 million Gains Tax and the $2.1 million of additional tax liability outlined in Claim 300 since they are both part of the same claim, arising from the same transaction.

The Appellants advance a three-tiered argument in support of their appeal on this issue. First, they argue that there was no

---

financiera, S.A. v. Nordberg, ___ U.S. ___, 109 S. Ct. 2782 (1989), the Supreme Court held that filing a proof of claim with a bankruptcy court alters a party's Seventh Amendment right to a jury trial. *See also Katchen v. Landy*, 382 U.S. 323 (1966).

intentional waiver of the State's immunity rights and that filing a proof of claim is not *per se* a waiver. Appellants suggest that since they "vigorously asserted" the immunity defense while filing the proof of claim, *i.e.* Claim 300, and that such filing was a "routine administrative act performed by a mid-level official," that waiver could not have been intended and is inequitable. Appellant's memorandum of law at 35. In essence Appellants suggest that a filing of a proof of claim by an official is not "the same as a declaration of waiver by an attorney in court" because, in the latter case, "the court may remind the attorney of his client's previous assertions of the defense and inquire [about] . . . the actual intent of the client." *Id.*[8]

The statutory language does not support Appellants' contention. Under section 106(a), a court is not required to evaluate a governmental unit's intention in asserting a claim against the debtor's estate. Any requirement as to intent is satisfied where the State acts in a way which conforms to the terms of the statute. A court is asked simply to determine whether a claim has been made which arises from the same transaction. *See In re Lile*, 96 Bankr. 81, 84 (Bankr. S.D. Tex.1989). The reasoning in *Hoffman*, 109 S. Ct. at 2822, and *Gardner*, 329 U.S. at 574, likewise, suggest that by filing a proof of claim, a state has offered concrete evidence of its intent to waive any immunity defenses.

Second, Appellants suggest that even if the Court concludes, as it has, that the filing of a proof of claim waives immunity,

---

8 In further resisting the conclusion that the State waived any immunity defenses, Appellants suggest that an intentional waiver of sovereign immunity in this instance would have been meaningless since the Gains Tax "had already been paid." Appellants memorandum of law at 8. Yet, this assertion fails to account for the provisional nature of the tax paid. The amount of the Gains Tax was determined by a Tentative Assessment and Return, issued by the Tax Department. *Id.* at 5. Under New York law, the State has three years from the date of transfer to make an additional Gains Tax assessment on a sale. New York Tax Law § 1444.3(a) (Law. Co-op. 1990). Further, Appellants argument does not account for the significant additional revenue the State stood to gain by filing a proof of claim. Claim 300 asserts additional tax liabilities of $2.1 million of Gains Tax based on the same transaction—the sale of the Stanhope.

the statutory language in section 106(a) subjects the State to a very limited waiver of immunity, allowing counterclaims only as to the specific proof of claim filed, which in this case is the approximately $2.1 million of taxes at issue in Claim 300. The problem with this interpretation is that it ignores the language in the statute referring to "any claim . . . that arose out of the same transaction." The additional $2.1 million of tax liability arises out of the same Stanhope transaction and is based on a provision of the Gains Tax Law which allows the Appellants to re-evaluate whether the first assessment imposed in the pre-sale audit is sufficient. In order to assert a right against the debtor's estate for additional taxes, involving the same transaction, Appellants must file a proof of claim to effectuate their request for funds under the control of the Bankruptcy Court. As discussed above, this, in essence, requires waiving any immunity defenses as to the claim at issue.

A final argument advanced by Appellants is that a waiver of immunity cannot be applied retroactively to affect the Gains Tax paid prior to the sale of the Stanhope. While the Second Circuit has not directly addressed this question, the issue is not one of first impression. In *WJM, Inc. v. Massachusetts Department of Public Welfare*, 840 F.2d 996, 1002-04 (1st Cir.1988), the First Circuit held that a waiver by a state entity was binding, although the filing of a proof of claim occurred some months after the adversary proceedings were concluded, but before the opinion was issued. Factually, *WJM* is on all fours with this action, if not a more difficult case. As the First Circuit recognized, federal medicaid reimbursement law *required* the State of Massachusetts to file a proof of claim to recover any potential overpayment it made. In concluding, nonetheless, that the State had waived any immunity defenses, the court wrote, "we think the waiver should be viewed as having retroactively validated the bankruptcy court's earlier, as well as its subsequent, actions" on the claims. *Id* at 1004.

This Court concludes that the reasoning in *WJM* is sound and should be followed in this instance. Since the Appellants derived certain benefits from the Bankruptcy Court by potentially retrieving assets that might otherwise have been lost, it

would be inequitable to permit the debtors' claims as to the transaction at issue to be frustrated by allowing the State to establish immunity as to a portion of the claim merely by waiting a certain period to file a proof of claim. If this Court were to accept Appellants' arguments, the State would gain all the advantages of the Bankruptcy Court without being subject to its jurisdiction. For this reason, the Court concludes that the significant fact for immunity purposes is that the State filed a proof of claim—not the date that such a filing occurred. As such, Appellants voluntarily waived any immunity defenses on claims involving the Gains Tax liability.

B. *Transfer or Income Tax?*

Turning to the merits we note as a preliminary matter that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(a) (1988), since this is an appeal from a final judgment of the Bankruptcy Court rendered in an adversary proceeding. The controversy in this case is whether the Gains Tax paid by Appellees to Appellants, under the New York Tax Law[9], in order to transfer their interest in the Stanhope pursuant to a Bankruptcy Court Plan, is correctly characterized as an income tax or a transfer tax. The Bankruptcy Code exempts debtors, such as Appellees, pursuant to a plan of reorganization, from all transfer, stamp and similar taxes upon the sale of real property. No such exemption applies for income taxes. Based on the statutory language in the Bankruptcy Code, federal case law, and state and federal tax opinion letters, this Court concludes that the Gains Tax imposed on the income received from the sale of the Stanhope was similar to a transfer or stamp tax. Appellees were therefore entitled to an exemption under the Bankruptcy Code from the New York Gains Tax.

Section 1146(c) of the Bankruptcy Code states, in pertinent part:

---

9 The New York Tax Law states, "A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain."

> The issuance, transfer, or exchange, of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp or similar tax.

11 U.S.C. § 1146(c) (1988). Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through the granting of tax relief. According to the legislative history, congressional intent was to give greater relief to debtors than that which was available under section 267 of the Bankruptcy Act. The Report of the House Judiciary Committee stated, "Section 1146(c) of title 11 broadens the exemption to any stamp or similar tax on a security or transfer instrument dealt with under the consolidated chapter 11. No opposition has been voiced with respect to this section." H.R. Rep. No. 595, 95th Cong., 1st Sess. 281 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6238.

The controversy in this action concerns that portion of section 1146(c) which limits exemptions under the Bankruptcy Code to a "stamp or similar tax." At issue is the definition and parameter of a "stamp or similar tax."[10] While the Second Circuit has considered the statutory meaning of certain portions of section 1146(c) of the Bankruptcy Code, including the legal effect of a "transfer under a plan," it has never reached the question of whether the Gains Tax is a "stamp or similar tax." *See City of New York v. Jacoby-Bender, Inc.*, 758 F.2d 840, 841-42 (2d Cir. 1985). The only relevant appellate guidance to this case is the Second Circuit Court's rejection in *Jacoby-Bender* of a constricted view of section 1146(c) of the Bankruptcy Code. Focusing upon the practical workings of the exemption, the Court adopted a mode of analysis which suggests a broad reading of this portion of the Bankruptcy Code. *Id.*

---

10 There is no disagreement in the application of other aspects of section 1146(c). Certainly Appellees have "transferred" a parcel of real property, the Stanhope, and that the sale of the property was in connection with a confirmed bankruptcy "plan."

The only prior case which specifically addresses whether the Gains Tax constitutes a "stamp or similar tax" is the bankruptcy court decision in *In re Jacoby-Bender, Inc.*, 40 Bankr. 10 (Bankr. E.D.N.Y. 1984), *aff'd mem.*, No. 84-1564 (E.D.N.Y. Sept. 18, 1984), *aff'd*, 758 F.2d 840 (2d Cir.1985). There the Bankruptcy Court held that the Gains Tax was akin to an income tax and not exempt under section 1146(c) because it was levied upon only the gain realized by the debtor and not upon the instrument of transfer.[11] In the instant case, the Bankruptcy Court held that the tax was a transfer tax, which is similar to a stamp tax, since it is imposed on a transaction by transaction basis without regard to whether taxpayers realized a gain or suffered a loss from all of its transactions during the relevant period.

While there is little guidance available in determining whether the Gains Tax at issue is a "stamp or similar tax" within the meaning of the Bankruptcy Code, the Court is not without some guideposts. In other contexts, federal courts have identified the characteristics relevant to determining whether a particular levy by the state is a stamp tax. There are three common elements present in all stamp taxes. First, the tax is imposed only upon a transfer or sale of the item at issue. Second, the amount of tax due is determined by the consideration recited in the deed of the transfer. Finally, the taxes must have been paid as a prerequisite to recording. *See Lee v. Bickell*, 292 U.S. 415, 417 (1934) (stamp tax placed on original issue and transfer or sale of stocks and bonds); *Texaco, Inc. v. United States*, 624 F.2d 20, 21 (5th Cir. 1980) (federal stamp tax on deeds by which realty is transferred).[12]

Applying these general criteria, the Second Circuit analysis of section 1146(c) outlined in *Jacoby*, and congressional intent

---

11 This portion of the Bankruptcy Court's decision was not addressed by the Second Circuit in *Jacoby-Bender* since New York State had stipulated to return the Gains Tax payment, thereby mooting appellate review. 768 F.2d at 840-43.

12 Stamp taxes may have characteristics such as actual stamps on the written instrument to show that a tax has been paid. The absence of an actual stamp, however, is not necessarily determinative that the tax paid is not a stamp tax or similar type tax. *See Jacoby-Bender, Inc.*, 40 Bankr. at 10.

to give greater tax relief to debtors, we conclude that the essential stamp tax characteristics are present in the Gains Tax. First, the tax is imposed on a transaction by transaction basis, payable on transfer, without regard for other transfers made over a given time. Second, the consideration paid to the transferor and recited in the instrument, *i.e.*, the deed, plays an essential role in assessing the amount of Gains Tax due. In fact, the primary considerations are the acquisition cost and the sale cost.[13] Finally, the Gains Tax must be paid at the time of transfer, as state law prohibits recording of the conveyance until this act is done. *See* N.Y. Tax Law § 1447(f) (McKinney 1987). Failure to record makes null and void the conveyance of real property to a subsequent purchaser who acquires the property in good faith and for valuable consideration. *See* N.Y. Real Property Law § 291 (McKinney 1989). It was for precisely this reason that Appellees paid the Gain Tax assessed, rather than awaiting an outcome of the matter in the Bankruptcy Court.

There are other factors that indicate that the New York Tax Law is a transfer or stamp tax based on the transfer of real property rather than on the income generated thereby. First, the original purchase price is not adjusted to reflect depreciation cost deductions allowed in the operation of commercial real estate. Without this adjustment for depreciation, the Gains Tax is not based on a true measure of accrued wealth, as would be the case for calculating gain for income tax purposes. Second, the Gains Tax is not assessed against all profitable transactions. Only those transfers in which the consideration exceeds $1,000,000 are subject to this tax. There is no Gains Tax imposed until this amount is exceeded, at which point the entire gain is taxed at ten percent, not merely that portion of the gain exceeding $1,000,000. Third, unlike income tax liability, the transferee is secondarily liable for the amount owed if the transferor does not pay the Gains Tax. In toto, the result

---

13 Certain statutorily permitted adjustments (including certain capital improvements and fees paid to brokers, surveyors, engineers and attorneys) are added to the transferor's original purchase price and then subtracted from the consideration received for the transfer. *See generally* N.Y. Tax Law § 1440(5) (McKinney 1987); 20 N.Y. Comp. Codes R. & Regs. § 590.14-17 (1988).

is the taxation of a certain class of transfers and not the taxation of a certain class of income.

This interpretation is also consistent with both federal and state revenue rulings. The State of New York has made certain revenue rulings with respect to the Gains Tax concluding that it is a transfer tax rather than an income tax. On September 21, 1983, the Tax Department found:

> The State gains tax is a transfer tax rather than a property or income tax since the triggering mechanism of the tax is the transfer of real property. Whereas the gains tax is a tax upon the transfer of real property, a property tax is a levy on the property itself. Income taxes are generally applied to net gain. Under the gains tax, the loss from one transfer of real property does not effect the applicability of the gains tax as to another transfer of real property in the same tax year. For these reasons, it is our opinion the State gains tax should be classified as a State transfer tax and should be treated as such for purposes of deductibility.

See Appendix A. A few months later, in another letter describing the Gains Tax and reiterating their prior position, the State wrote, "the tax is classified by New York as a transfer tax . . . because it is triggered by the transfer of the property, not by other incidents of ownership." *See Appendix B*.

In both of these rulings, the State was influenced by Internal Revenue Service ("IRS") ruling 80-121 which held that a gains tax in Vermont, similar to the Gains Tax, was a transfer and not an income tax for federal tax purposes. The IRS took this position primarily because the Vermont State tax was not structured to account only for net gain. Under the Vermont tax, as under the Gains Tax, a taxpayer could make two transfers on the same day, one earning $1,000,000 and the other losing $1,000,000 so that at the end of the day there has been no net increase in wealth. Nonetheless, the taxpayer would be liable for the gains tax on the profitable transaction and could not offset losses. Furthermore, the Vermont gains tax did not allow for depreciation or other types of costs usually associated with arriving

at the economic net gain. In order for IRS to characterize a tax as an income tax under section 164(a)(3) of the Internal Revenue Code, a taxpayer must be allowed to reduce taxable gains by any losses experienced during the same tax year and to deduct depreciation costs.

Appellants suggest that these tax opinions are merely advisory and are not binding on New York with respect to this debtor. The only estoppel effect these opinions have, according to Appellants, is with respect to the parties who made the requests for the advice. *See* 20 N.Y. Comp. Codes R. & Regs. § 901.4 (1988). Moreover, the Appellants argue that these rulings do not suggest that the Gains Tax is a stamp tax. Rather, Appellants urge that a stamp tax is an excise tax which is imposed on such events as the drawing of a will, deed or mortgage recordings and taxes on such goods as cigarettes and liquor. According to the Appellants the transfer of the Stanhope is not akin to the types of events and goods upon which a stamp is affixed.

Appellants' arguments are unavailing. First, while the state tax rulings are not binding on this court, they are persuasive evidence that the Gains Tax is not an income tax. Moreover, Appellants' suggestion that the stamp tax should be narrowly understood as applying only to a few events is equally unpersuasive. This argument fails to account for the statutory language of section 1146(c) which does not limit the tax exclusion only to a stamp tax. Section 1146(c) exempts "a stamp or *similar tax*" (emphasis added). Since the Gains Tax has many of the characteristics of a stamp tax and few of the qualities of an income tax, this Court concludes that Appellees were entitled to an exemption under section 1146(c) of the Bankruptcy Code since the Gains Tax is a "stamp or similar tax."

The Opinion and Order of the Bankruptcy Court are affirmed.

SO ORDERED.

Dated: May 16, 1991
New York, New York

/s/ [ILLEGIBLE]
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 5744 (LBS)

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiffs-Appellees,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JAMES W. WETZLER as Commissioner of Taxation and Finance, and EDWARD V. REGAN as Comptroller of the State of New York,

Defendants-Appellants.

ORDER AMENDING OPINION

SAND, J.

The Opinion rendered in this matter dated May 16, 1991 is hereby amended to include Appendix A and Appendix B referred to on page 18 of the Opinion.

SO ORDERED.

Dated: May 17, 1991
New York, New York

/s/ [ILLEGIBLE]
U.S.D.J.

APPENDIX A

STATE OF NEW YORK
Department of
Taxation and Finance
Albany, New York 12227
Law Bureau
State Campus,
Albany, New York 12227
September 21, 1983

Dear :

This letter is in reply to your inquiries of June 9 and June 27, 1983 concerning Article 31-B of the Tax Law, the New York Real Property Transfer Gains Tax. You had questions as to the treatment of the tax for State corporate franchise and personal income tax purposes, and as to how the "acquisition of controlling interest" provisions of the tax are to be applied.

In order to determine the deductibility of the gains tax for corporate franchise and personal income tax purposes, the tax must first be classified. The New York State Real Property Transfer Gains Tax is a levy on gains derived from the transfer by any method of an interest in real property located in New York where the consideration is one million dollars or more.

The State gains tax is a transfer tax rather than a property or income tax since the triggering mechanism of the tax is the transfer of real property. Whereas the gains tax is a tax upon the transfer of real property, a property tax is a levy on the property itself. Income taxes are generally applied to net gain. Under the gains tax, the loss from one transfer of real property does not effect the applicability of the gains tax to another transfer of real property in the same tax year. For these reasons, it is our opinion that the State gains tax should be classified as a State transfer tax and should be treated as such for purposes of deductibility.

It should be noted, however, that though the Department's views are expressed herein, the Internal Revenue Service will ultimately determine the deductibility of the gains tax for Fed-

eral tax purposes, and that State tax policy is usually formulated in accordance with the Federal treatment of the tax. It is our opinion, in light of Revenue Ruling 80-121, that the Internal Revenue Service will classify the gains tax as being a transfer tax. In that ruling, Vermont's land gains tax, as imposed by sections 10001 through 10010, Title 32, of the Vermont Statutes Annotated, was deemed to be a transfer tax. The Vermont land gains tax is conceptually similar to New York's gains tax in that the Vermont statute levies a tax on gain from the sale or exchange of land. Under their statute, a sale or exchange of land is any transfer of title to land for a consideration, and taxable gain is the amount realized from a sale or exchange of land, less the transferor's basis in the land.

Section 164(a) of the Internal Revenue Code describes various types of taxes that are allowed as a deduction for the taxable year within which paid or accrued. Specifically allowed are: (1) State and local real property taxes; (2) State and local personal property taxes; (3) State and local income taxes; and (4) State and local general sales taxes. Section 164(a) of the Code also allows, as a deduction, State and local taxes not specifically described that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for the production of income).

In determining that the Vermont land gains tax is a transfer tax, Revenue Ruling 80-121 first distinguished other forms of taxes as not being applicable. The Ruling provides, in pertinent part, as follows:

> "The Vermont land gains tax is not imposed or triggered by the ownership of real property, but rather, by the exercise of one of the incidents of property ownership, the transfer of real property at a gain. The land gains tax is not measured by the value of the real property, but rather, by the gain derived from the transfer of that property . . . . Thus, the land gains tax is not a real property tax within the meaning of section 164(a)(1) of the Code."

With respect to the Vermont land gains tax qualifying as a State income tax within the meaning of section 164(a)(3) of the

Code, the Revenue Ruling distinguishes the land gains tax from Federal income taxes, stating that the State tax, unlike the Federal income tax, is not structured to fall on net gain. The taxpayer, as a result of the gains tax, cannot reduce taxable gain from sales or exchanges of land during the taxable year by any losses from other sales or exchanges of land during that year. Under Federal income tax law, taxpayers are allowed to reduce gains from sales or exchanges of land by losses from sales or exchanges of land. Noting that a taxpayer could be required to pay the land gains tax even though under Federal income tax laws that same taxpayer may have a net loss from sales or exchanges of land, the ruling concluded that the tax is not an income tax under section 164(a)(3) of the Code.

In light of Revenue Ruling 80-121, it is the Department's opinion that the New York State Real Property Transfer Gains Tax is a transfer tax, and for purposes of Federal deductibility, the tax is deductible for purposes of computing adjusted gross income under section 164(a) of the Internal Revenue Code only to the extent that it is paid or accrued within the taxable year in carrying on a trade or business, or in connection with an activity described in section 212 of the Internal Revenue Code relating to expenses for the production of income.

For State income tax purposes, section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income, with certain modifications. Since the State gains tax will be deductible for purposes of computing Federal adjusted gross income, it will automatically be excluded from the computation of New York adjusted gross income, since there is no provision in the Tax Law adding back such amounts for purposes of such computation. A similar provision is found in Article 9-A of the Tax Law, the corporate franchise tax. Section 208 defines "entire net income" to mean total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department. Since the State gains tax will be deducted from the taxable income the taxpayer is required to report to the United States Treasury Department, the tax will automatically be excluded from the computation of the state

franchise tax since there is no provision adding it back for purposes of computing entire net income.

With regard to your inquiry as to how the acquisition of controlling interest provisions of the tax are to be applied, one must look to what is acquired, not to what is maintained. The tax is imposed on gains from the transfer of any interest in real property, which is defined to include "acquisition of a controlling interest" in any entity with an interest in real property. (Tax Law, § 1440.7) The term "controlling interest" is defined in section 1440.2 of the Tax law to mean:

> "(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and
>
> (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

The key term in these provisions is "acquisition". For purposes of the gains tax, if no partner acquires a controlling interest in the partnership, there is no transfer subject to the tax. In the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when an individual, group of individuals acting in concert to avoid the tax, or another entity becomes the owner of 50% or more of the voting stock in such corporation. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax.

For your further information, I am enclosing a copy of Publication 588 containing questions and answers on the gains tax or real property transfers.

Very truly yours,

JOHN P. DUGAN
Deputy Commissioner and Counsel

TWS/cjm
Enclosure

APPENDIX B

STATE OF NEW YORK
Department of
Taxation and Finance
Albany, New York 12227
Law Bureau
State Campus,
Albany, New York 12227
November 14, 1983

Dear :

This letter is in response to your inquiry of September 23, 1983 regarding Article 31-B of the Tax Law, The New York Real Property Transfer Gains Tax. You asked whether the payment of tax pursuant thereto would avail the taxpayer of a credit or deduction for partnership or individual income tax purposes. It is our opinion that, if anything, a deduction would be allowed.

The treatment of taxes for such purposes largely depends upon the classification of the tax. Comparably classified taxes generally receive similar deduction treatment. The New York State Real Property Transfer Gains Tax is a levy on gains derived from the transfer by any method of an interest in real property located in New York where the consideration is one million dollars or more.

The tax is classified by New York as a transfer tax rather than a property tax because it is triggered by the transfer of the property, not by other incidents of ownership, and not levied on the land itself.

It should be noted, however, that though the Department's views are expressed herein, the Internal Revenue Service will ultimately determine the deductibility of the gains tax for Federal tax purposes, and that State tax policy is usually formulated in accordance with the Federal treatment of the tax. It is our opinion, in light of Revenue Ruling 80-121, that the Internal Revenue Service will classify the gains tax as being a transfer tax. In that ruling, Vermont's land gains tax, as imposed by

sections 10001 through 10010, Title 32, of the Vermont Statutes Annotated, was deemed to be a transfer tax. The Vermont land gains tax is conceptually similar to New York's gains tax in that the Vermont statute levies a tax on gain from the sale or exchange of land. Under their statute, a sale or exchange of land is any transfer of title to land for a consideration, and taxable gain is the amount realized from a sale or exchange of land, less the transferor's basis in the land.

Section 164(a) of the Internal Revenue Code describes various types of taxes that are allowed as a deduction for the taxable year within which paid or accrued. Specifically allowed are: (1) State and local real property taxes; (2) State and local personal property taxes; (3) State and local income taxes; and (4) State and local general sales taxes. Section 164(a) of the Code also allows, as a deduction, State and local taxes not specifically described that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for the production of income).

In determining that the Vermont land gains tax is a transfer tax, Revenue Ruling 80-121 first distinguished other forms of taxes as not being applicable. The Ruling provides, in pertinent part, as follows:

> "The Vermont land gains tax is not imposed or triggered by the ownership of real property, but rather, by the exercise of one of the incidents of property ownership, the transfer of real property at a gain. The land gains tax is not measured by the value of the real property, but rather, by the gain derived from the transfer of that property . . . . Thus, the land gains tax is not a real property tax within the meaning of section 164(a)(1) of the Code."

With respect to the Vermont land gains tax qualifying as a State income tax within the meaning of section 164(a)(3) of the Code, the Revenue Ruling distinguishes that land gains tax from Federal income taxes, stating that the State tax, unlike the Federal income tax, is not structured to fall on net gain. The taxpayer, as a result of the gains tax, cannot reduce taxable gain from sales or exchanges of land during the taxable year by

any losses from other sales or exchanges of land during that year. Under Federal income tax law, taxpayers are allowed to reduce gains from sales or exchanges of land by losses from sales or exchanges of land. Noting that a taxpayer could be required to pay the land gains tax even though under Federal income tax laws that same taxpayer may have a net loss from sales or exchanges of land, the ruling concluded that the tax is not an income tax under section 164(a)(3) of the Code.

In light of Revenue Ruling 80-121, it is the Department's opinion that the New York State Real Property Transfer Gains Tax is a transfer tax, and for purposes of Federal deductibility, the tax is deductible for purposes of computing adjusted gross income under section 164(a) of the Internal Revenue Code only to the extent that it is paid or accrued within the taxable year in carrying on a trade or business, or in connection with an activity described in section 212 of the Internal Revenue Code relating to expenses for the production of income.

For State income tax purposes, section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income, with certain modifications. Since the State gains tax will be deductible for purposes of computing Federal adjusted gross income, it will automatically be excluded from the computation of New York adjusted gross income, since there is no provision in the Tax Law adding back such amounts for purposes of such computation. A similar provision is found in Article 9-A of the Tax Law, the corporate franchise tax. Section 208 defines "entire net income" to mean total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department. Since the State gains tax will be deducted from the taxable income the taxpayer is required to report to the United States Treasury Department, the tax will automatically be excluded from the computation of the state franchise tax since there is no provision adding it back for purposes of computing entire net income.

For your further information, I am enclosing a copy of Publication 588 containing questions and answers on the gains tax or real property transfers.

Very truly yours,

JOHN P. DUGAN
Deputy Commissioner and Counsel

LMP:pbc
Enclosure

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 88 B 10237 (TLB)
Chapter 11
Adv. Pro. No. 89-5449A

August 2, 1990

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiff,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JAMES W. WETZLER AS COMMISSIONER OF TAXATION AND FINANCE, AND EDWARD V. REGAN AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendants.

JUDGMENT AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(A&F #303)

Upon the amended complaint dated March 6, 1989 by 995 Fifth Avenue Associates, L.P. ("Plaintiff"); and upon the order of the Court dated November 29, 1988 authorizing, *inter alia*, the Plaintiff to sell its interest in a hotel and related restaurant and catering facilities together with the assignment of a lease for non-residential real property (the "Stanhope Hotel"); and

upon the amended proof of claim of New York State dated October 23, 1989; and upon Plaintiff's motion ("Motion") for summary judgment dated May 1, 1989, seeking a judgment by the Court that: (a) the sale ("Sale") by the Plaintiff of its interest in the Stanhope Hotel pursuant to a Chapter 11 plan of reorganization under Title 11 of the United States Bankruptcy Code ("Bankruptcy Code") was exempt under Section 1146(c) of the Bankruptcy Code from the imposition of the tax imposed on the gains derived from the transfer of real property within the State of New York pursuant to N.Y. Tax Law § 1441 ("Gains Tax"); and (b) the payment made under protest by the Plaintiff in the amount of $2,608,603.80 ("Gains Tax Payment") in satisfaction of its alleged Gains Tax liability be refunded to the Plaintiff; and upon the papers filed by the Plaintiff in support of the Motion; and upon the papers filed by the Defendants in opposition to the Motion; and a hearing having been held before me on May 23, 1989; and the Plaintiff having appeared by Joshua J. Angel, Esq. and Leonard H. Gerson, Esq. of Angel & Frankel, P.C.; and the Defendants having appeared by David S. Cook, Esq., Assistant Attorney General of the State of New York; and upon the record of said hearing held before me; and upon the written decision of this Court, dated July 13, 1990; it is

Now, upon motion of Angel & Frankel, P.C., attorneys for the Plaintiff,

ORDERED, ADJUDGED AND DECREED that:

1. The Sale was and is exempt from payment of the Gains Tax pursuant to Section 1146(c) of the Bankruptcy Code.

2. New York State has waived its sovereign immunity with respect to the Gains Tax for which it has filed a proof of claim in this case.

3. Defendants be, and they hereby are authorized and directed to refund to the Plaintiff, within eleven (11) days after the date of entry of this order, the Gains Tax Payment plus interest at the legal rate from the date on which the Gains Tax

Payment was made through and including the date on which the refund directed by this order is delivered to the Plaintiff.

4. Defendants' cross-motion for summary judgment for failure to state a claim be, and the same hereby is denied.

Dated: New York, New York
August 1, 1990

/s/ TINA L. BROZMAN
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 88 B 10237(TLB)
Chapter 11
Adv. Pro. No. 89-5449A

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

995 FIFTH AVENUE ASSOCIATES, L.P.

Plaintiff,

—against—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JAMES W. WETZLER as Commissioner of Taxation and Finance, and EDWARD V. REGAN as Comptroller of the State of New York,

Defendants.

DECISION GRANTING MOTION FOR SUMMARY JUDGMENT

ANGEL & FRANKEL, P.C. by Joshua J. Angel, Leonard H. Gerson, Ira R. Abel, New York City, for debtor.

ROBERT ABRAMS, Atty. Gen. of the State of New York by David Cook, Marcie Mintz, New York City, for defendants.

TINA L. BROZMAN, *United States Bankruptcy Judge.*

At issue in this adversary proceeding is whether section 1146(c) of the Bankruptcy Code, 11 U.S.C.A. § 1146(c) (West Supp. 1990) (Section 1146(c)) exempts a debtor in possession from payment of the tax imposed on the gains derived from the transfer of real property within the State of New York pursuant to N.Y. Tax Law § 1441 (McKinney 1987) (the Gains Tax). 995 Fifth Avenue Associates, L.P. (the Debtor), the debtor in this chapter 11 case, moves for summary judgment arguing that Section 1146(c) does apply and that the $2,608,603.80 Gains Tax payment it made under protest should be returned. The New York State Department of Taxation and Finance (the Tax Department), James W. Wetzler as Commissioner of Taxation and Finance, and Edward V. Regan as Comptroller of the State of New York (collectively, New York) have cross-moved for summary judgment to dismiss for failure to state a claim, arguing that the Section 1146(c) exemption does not apply and that the Eleventh Amendment and the doctrine of sovereign immunity are complete defenses to the adversary proceeding. For the reasons set forth below, I conclude that Section 1146(c) does exempt the Debtor from liability for the Gains Tax and that neither the Eleventh Amendment nor the doctrine of sovereign immunity precludes entry of judgment against New York because it filed a proof of claim relating to the Gains Tax after it interposed its claim of immunity.

I. Background

The salient facts are largely undisputed. The Debtor filed its Chapter 11 petition on February 4, 1988. Its business was the operation of a hotel and related restaurant and catering facilities known as the Stanhope Hotel (the Stanhope), a business which the Debtor continued to operate as debtor in possession. Over the course of the bankruptcy case, the Debtor filed an original and three subsequent amended plans of reorganization (collectively, the Plan), all of which contemplated the sale of

the Debtor's interest in the Stanhope. On July 20, 1989, the Plan was confirmed.

Prior to confirmation and by order dated November 29, 1988 (the Sale Order), I authorized the Debtor to sell and/or assume and assign its interest in the Stanhope for $76,000,000. The Sale Order declared that the sale was being made under a plan of reorganization and, pursuant to Section 1146(c), would be exempt from any federal, state, or local transfer taxes. The closing of the sale was scheduled for January 13, 1989. On January 12, pursuant to the pre-transfer audit procedures provided by N.Y. Tax Law § 1447 (McKinney 1987), New York issued a Tentative Assessment and Return imposing a Gains Tax of $2,608,603.80 on the proposed sale and transfer. Citing the relevant provisions of the Sale Order and Section 1146(c), the Debtor requested but was denied an exemption from the Gains Tax. Because state law prohibits recordation in the local land records without payment of any tax due under the Tentative Assessment and Return, the Debtor paid the Gains Tax under protest to allow the deed to be recorded and the sale to close the following day. N.Y. Tax § 1447(f) (McKinney 1987). Since the filing of the petition, New York has filed claims against the Debtor's estate based on both pre and post-petition tax obligations, with the most recent amended claim including a liability for the Gains Tax.[1]

---

1 New York filed an amended claim dated October 23, 1989 which it designated as "3rd Amended Administrative Expense" (claim number 300 on the Clerk of the Court's claims docket). The cover sheet attached to claim number 300 indicates that the amendment is based in part "on the addition of Gains Tax Liability" with the text of the claim referencing the statutory provision imposing the tax. Claim number 300 was filed after I heard oral argument on the summary judgment motions and after the parties submitted post-trial memoranda in support of their respective positions. In light of New York's voluntary submission to my jurisdiction, most of its challenges to my ability to grant the relief sought by the Debtor have evaporated.

II. The 1146(c) Exemption

Section 1146(c) provides:

> The issuance, transfer, or exchange of a security or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

For the exemption from tax liability to apply, a three pronged test must be fulfilled: 1) the tax must be a stamp or similar tax; 2) imposed upon the making or delivery of an instrument transferring an interest in real property; and 3) in connection with a confirmed bankruptcy plan. *In re The Baldwin League of Independent Schools*, case No. 88 B 10401(CB) (June 21, 1988) (oral op.), *aff'd*, 110 Bankr. 125 (S.D.N.Y. 1990). The major challenge in this case is the satisfaction of the first prong, that is, whether the Gains Tax qualifies as a stamp or similar tax. New York relies almost exclusively on the bankruptcy court's decision in *In re Jacoby-Bender, Inc.*, 40 Bankr. 10 (Bankr. E.D.N.Y. 1984), *aff'd mem.*, No. 84-1564 (E.D.N.Y. Sept. 18, 1984), *aff'd*, 758 F.2d 840 (2d Cir.1985), which held that the Gains Tax was not exempt under Section 1146(c). So much of the bankruptcy court's decision as dealt with the Gains Tax was never appealed.

In *Jacoby*, the debtor sought an order exempting it from payment of the New York City Real Estate Transfer Tax, the New York State Real Estate Transfer Tax (collectively the Transfer Taxes) and the New York State Capital Gains Tax, the same Gains Tax presently in issue. The *Jacoby* court inquired into the meaning of the phrase "stamp or similar tax" but found no legislative history or court decisions directly construing Section 1146(c) or its precursors. It reasoned that two essential characteristics of stamp taxes are that the amount of the tax is usually determined by the consideration recited in the deed of transfer and that the taxes must be paid as a prerequisite to recording. Other characteristics of lesser importance to the Court's analysis included the use of stamps as visible evidence that the tax had been paid (deemed not "crucial" to the purpose

served by the statutory exemption) and the "technical" feature that stamp taxes are charged on written instruments recognized in law as evidence of the enforcement of legal rights. *Jacoby*, 40 Bankr. at 13; *see also In re Amsterdam Ave. Dev. Assoc.*, 103 Bankr. 454, 456-57 (Bankr. S.D.N.Y. 1989) (citing *Jacoby*). Further, the *Jacoby* court noted that stamp taxes are similar to excise taxes, which are generally imposed upon the sale or use of certain articles and on certain transactions.

Carefully examining the characteristics of the Transfer Taxes, the court held them to fall within the purview of Section 1146(c). It noted that the amount of the Transfer Taxes is determined by the consideration or value of the property conveyed; that payment of the taxes is a precondition to recording; that recordation of the deed is "clear and convenient evidence" of payment of the Transfer Taxes so that affixing stamps to the instrument of transfer is not necessary; and that the Transfer Taxes are taxes upon deeds recognized in law as important evidence of legal rights.

When considering the possible exemption from the Gains Tax, the *Jacoby* court did not address any of the characteristics it so meticulously reviewed with regard to the Transfer Taxes. Rather, the court found that the only similarity between the Gains Tax and taxes exempt under Section 1146(c) is that both are imposed at the time of transfer. Without further ado, the court held that the Gains Tax was an income tax rather than an excise tax, because it was levied only upon the gain realized by the debtor and not upon the instrument of transfer. The court stated that unlike the Gains Tax, all of the stamp taxes it had previously discussed were imposed regardless of whether the transferor gained or lost money on the transaction. With good reason, New York relies on *Jacoby*, emphasizing that the *Jacoby* holding has been codified in the New York State tax regulations. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 590.65 (1988).

Although the *Jacoby* debtor appealed the unfavorable determination regarding the Gains Tax, New York State subsequently stipulated to return the Gains Tax payment,[2] thereby

2 The parties here dispute the circumstances leading to the stipulation. That dispute is wholly irrelevant.

mooting appellate review. Accordingly, the decision is not binding precedent as to the Gains Tax. Of lesser precedential value is the incorporation of the *Jacoby* result in the tax regulations of the State of New York; the reach of Section 1146(c) is a federal question to be resolved by defining the scope of federal law. *See Amsterdam*, 103 Bankr. at 458 (citing *United States v. L.N. White & Co.*, 359 F.2d 703, 714 n.16 (2d Cir. 1966)). Moreover, where a state tax has an impact upon a federal right, federal courts are not only free to, but must, look beyond the label affixed by the state to determine the nature of the tax and its effect on the federal right. *Amsterdam*, 103 Bankr. at 458 (citing *Carpenter v. Shaw*, 280 U.S. 363, 367-68, (1930)). It is therefore entirely appropriate to analyze the Gains Tax in light of *Baldwin League's* three pronged test for an exemption under Section 1146(c).

The amount of the Gains Tax is determined by adding statutorily permitted adjustments (including certain capital improvements and fees paid to brokers, surveyors, engineers and attorneys) to the transferor's original purchase price and then subtracting that amount from the consideration received for the transfer. *See generally* N.Y. Tax Law § 1440(5) (McKinney 1987); 20 N.Y. Comp. Codes R. & Regs., §§ 590.14-17 (1988). When the consideration paid for the transfer exceeds the adjusted original purchase price, a gain is realized upon which a ten percent tax is levied. Thus, the consideration paid to the transferor and recited in the instrument of transfer plays an essential role in assessing the Gains Tax due. For all intents and purposes, the Gains Tax must be paid at the time of transfer, as state law prohibits the recording of the conveyance until this act is done. *See* N.Y. Tax Law § 1447(f) (McKinney 1987). Recording the instrument of transfer provides evidence that the Gains Tax has been paid; without recordation, valuable legal rights are forfeited. *See* N.Y. Real Property Law § 291 (McKinney 1989) (any conveyance of real property not recorded is void against a subsequent purchaser who acquires property in good faith and for valuable consideration). Thus, the Gains Tax, like the Transfer Taxes discussed in *Jacoby*, seemingly shares both the essential and technical characteristics of a stamp or similar tax.

New York urges that *Jacoby* correctly classified the Gains Tax as an income tax rather than a transfer tax subject to exemption under Section 1146(c). The word "income" when used in relation to statutory provisions regarding income taxes must be given its plain and ordinary meaning. 71 Am.Jur.2d, *State and Local Taxation* § 483 at 784 (2d ed. 1973).

> In its ordinary and popular meaning, "income" is the amount of actual wealth which comes to a person *during a given period of time. . . . The word in most if not all connections involves time as an essential element in its measurement or definition.* It thus is differentiated from capital or investment, which commonly means the amount of wealth which a person has on a fixed date.

Id. at 784, n.75 (emphasis added) (citation omitted). *See also Black's Law Dictionary* 687 (5th ed. 1979) (income is "[t]he true increase in amount of wealth which comes to a person during a stated period of time"). *Compare Black's Law Dictionary* 1343 (5th ed. 1979) (transfer tax defined as a "[t]ax upon passing of title to property", implying an isolated transaction rather than transactions over a period of time). Indeed, New York's personal income tax provisions are based on a period of time designated as each taxpayer's "taxable year." *See* N.Y. Tax Law § 601 et seq. (McKinney 1987). The Gains Tax, however, is imposed on a transaction by transaction basis, payable on the transfer, without regard for any other transfers made over a given period of time. A taxpayer can make two transfers on the same day, one earning $1,000,000 and the other losing $1,000,000 so that at the end of the day he realizes no increase of wealth as ordinarily contemplated under an income tax scheme. Yet the taxpayer would be liable for the Gains Tax on the isolated, profitable transaction and could not offset his losses on the unprofitable transaction. This is certainly a result more in line with the imposition of a transfer tax than an income tax.

The Tax Department has in other contexts expressly defined the Gains Tax as a transfer tax and distinguished it from an income tax.[3] Specifically, the Tax Department issued two opin-

ion letters addressing taxpayer inquiries into treatment of the Gains tax for income tax purposes. The first of these letters, dated September 21, 1983, unequivocally stated:

> The State gains tax is a transfer tax rather than a property or income tax since the triggering mechanism of the tax is the transfer of real property. Whereas the gains tax is a tax upon the transfer of real property, a property tax is a levy on the property itself. Income taxes are generally applied to net gain. Under the gains tax, the loss from one transfer of real property does not effect the applicability of the gains tax to another transfer of real property in the same tax year. For these reasons, it is our opinion that the State gains tax should be classified as a State transfer tax and should be treated as such for purposes of deductibility.

The letter made reference to a revenue ruling issued by the Internal Revenue Service (the IRS) which held that a similar gains tax imposed by the State of Vermont was a transfer tax and not an income tax. In Revenue Ruling 80-121, the IRS explained that for federal income tax purposes, taxpayers were allowed to reduce gains from the sale of land by any losses incurred on the sale of other land during the taxable year. Rev. Rul. 80-121, 1980-1 C.B. 44. The Vermont tax, however, made no provision to offset gains from profitable real estate transactions against losses on unprofitable transactions and was deemed to be a tax on a particular transfer rather than on income. Noting that New York State tax policy is usually formulated in accordance with federal treatment of a tax, the opinion letter adopted this "net gain" analysis and determined that the Gains Tax was a transfer tax and thus not fully deductible against income. The second opinion letter, dated November 14, 1983, basically reiterated this position.[4] The Tax Department incorporated the conclusions of the two opinion letters, including their review of Rev. Rul. 80-121, into its official publication explaining the Gains Tax. *See* NYS Department of Tax-

---

3 Unremarkably, the contradictory constructions of the Gains Tax have the effect of increasing the taxpayer's liability in each instance.

ation and Finance, Questions and Answers–Gains Tax on Real Property Transfers, Publication 588 at 27 (November 1984).

Although such advisory opinions are not binding on New York with respect to this debtor, *see* 20 N.Y. Comp. Codes R. & Regs. § 901.4 (1988), the letters are no less instructive and directly on point. Never has New York argued that the opinion letters were mistaken or that it has subsequently changed its treatment of the tax for allocability of deductions. When asked at oral argument to reconcile the transfer tax analysis found in the opinion letters with its current position that the Gains Tax is an income tax, New York responded simply that the tax could be treated differently for different purposes. While that is undoubtedly true, New York's two positions are diametrically opposed with no articulated basis for the differing treatment of the same tax.

There are other factors which indicate that the Gains Tax is assessed on the transfer of real property rather than on the income generated thereby. First, the "original purchase price" for Gains Tax purposes is not adjusted to reflect depreciation of the real property transferred. Without an adjustment for depreciation, the Gains Tax is not based on a true measure of the transferor's accrued wealth as it would be for calculating the gain for income tax purposes. Second, the fact that the Gains Tax is not assessed against all profitable transactions undercuts the New York's argument that it is an income tax. Only transfers in which the consideration exceeds $1,000,000 are subject to the Gains Tax; once this cap is met the entire gain is taxed, not merely that portion exceeding $1,000,000. Thus, the Gains Tax is levied upon a certain class of transfers and not on a certain class of income. Further support for this theory is found in the fact that profitable transactions of less than $1,000,000 within a taxable period are subject to income tax but not the Gains Tax. Finally, in the event the transferor does not pay the Gains Tax, the transferee becomes personally

---

4 The court in *Jacoby* did not discuss and may not have had the benefit of these opinion letters at the time it rendered its decision. Copies of the letters are attached as an appendix to this decision.

liable for the tax. N.Y. Tax Law §§ 1447(3) (McKinney 1987); 20 N.Y. Comp. Codes R. and Regs., § 590.70 (1988). It is abundantly clear that the ultimate goal of the Gains Tax is not to tax the transferor's *income* but rather to tax any *transfers* in which he is involved.

The fact that Gains Tax is imposed only upon profitable transfers does not dictate that it is unlike a stamp or similar tax. The *Jacoby* court found this to be a distinguishing feature, noting that all of the stamp taxes it had reviewed were imposed "regardless of whether the transferor gained or lost money in the transaction involved." 40 Bankr. at 15. However, the Supreme Court has held it constitutional to impose stamp taxes on certain classes of transactions even though others are exempt from tax. *Brodnax v. Missouri*, 219 U.S. 285 (1911); *accord*, 71 Am.Jur.2d, *State and Local Taxation* § 638 at 894 (2d ed. 1973). For all these reasons, I am convinced that the Gains Tax shares the most important characteristics of a stamp or similar tax and that it meets the first prong to qualify for an exemption.

The Gains Tax also satisfies the second precondition for exemption under Section 1146(c). The Gains Tax is due at the time of conveyance and therefore is imposed upon the making or delivery of an instrument of transfer. New York argues that although the timing is identical, the Gains Tax is not imposed on the deed or transfer but rather on the gain realized. *See also Jacoby*, 40 Bankr. at 15. This is similar to the argument rejected in *Federal Land Bank v. Crossland*, 261 U.S. 374 (1923), where the Supreme Court found that a tax on recording a mortgage was equivalent to a tax on the mortgage itself. *See also Amsterdam*, 103 Bankr. at 457-58 (rejecting the argument that a mortgage tax was tax on the "privilege" of recording and not on the mortgage itself). In essence, New York's argument is that the tax is upon the privilege of realizing a gain and not on the transfer itself. However, as with the mortgage taxes discussed above, unless the Gains Tax is paid, the deed or instrument will not be recorded and valuable legal rights will be forfeited. Few purchasers of real property will commit themselves to transactions under these conditions, making recor-

dation an integral component of the conveyance. *Amsterdam*, 103 Bankr. at 458. For our purposes, then, the Gains Tax is analytically a tax on the transfer, and hence a tax on the instrument of transfer, notwithstanding New York's characterization of the prepayment requirement as merely a practical mode of collecting an income tax.

That the final prong of the *Baldwin League* test has been satisfied is undisputed here. The sale of the Stanhope was made pursuant to a subsequently confirmed plan of reorganization under chapter 11 of the Bankruptcy Code as required by Section 1146(c). Accordingly, the Gains Tax which the Debtor paid under protest was not due.

III. Waiver of Sovereign Immunity

Having found the Section 1146(c) exemption to apply, I must next determine whether the Eleventh Amendment or the doctrine of sovereign immunity precludes the exercise of jurisdiction over New York.[5] There are two well known exceptions to the doctrine of sovereign immunity and the Eleventh Amendment which allow a plaintiff to assert a claim against a state in federal court.[6] These exceptions, which can be

---

5 There is a technical distinction between common law sovereign immunity and the constitutional protections of the Eleventh Amendment. Sovereign immunity protects a state from a suit brought by one of its own citizens; a waiver of sovereign immunity goes to "whether" or "when" a state may be sued. The Eleventh Amendment prohibits suits against the several states in federal court and thus speaks to "where" a state may be sued. *See Lawson Burich Assoc., Inc. v. Axelrod (In re Lawson)* 59 Bankr. 681, 687 n.8 (Bankr. S.D.N.Y. 1986). The distinction is not crucial to this decision, as the Second Circuit has held that the waiver intended under section 106 encompasses both sovereign immunity and the protections of the Eleventh Amendment. *See Hoffman v. Connecticut Dep't of Income Maintenance, (In re Willington Convalesence Homes, Inc.)* 850 F.2d 50, 56 n.6 (2d Cir. 1988), *aff'd*, 109 S.Ct. 2818 (1989).

6 A state may also waive its immunity to private causes of action in federal court by enacting its own state statute or constitutional provision, provided the enactment does so in express and unmistakable language. *See Edelman v. Jordan*, 415 U.S. 651, 673, *reh'g denied* 416 U.S. 1000 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). New York State has enacted no such statute governing this adversary proceeding.

labeled "waiver by participation" and "waiver by abrogation" are both premised on Congressional legislation and are discussed below.

A. WAIVER BY PARTICIPATION

Waiver by participation occurs when a state engages in a federally sponsored activity in which Congress has made waiver of immunity a necessary condition of state participation. *See Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184 (1964), *overruled in part, Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 478 (1987).[7] However, before this can occur, the language of the congressional enactment must manifest "a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237 (1985), *reh'g denied* 473 U.S. 926 (1985). Mere participation by a state is inadequate, as "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . ." *Edelman*, 415 U.S. at 673; *accord WJM, Inc. v. Massachusetts Dep't of Public Welfare*, 840 F.2d 996, 1002 (1st Cir. 1988). By using unequivocal language, Congress places a state on notice of the consequence of its participation. Clear notice is required because, although bottomed on a congressional enactment, "the loss of immunity ultimately is grounded in waiver and consent by the State through conduct." *Texaco, Inc., v. Louisiana Land and Exploration Co.*, 113 Bankr. 924, 933 (M.D. La.1990).

---

7 In *Welch*, a four justice plurality, joined by a fifth justice concurring in part, overruled *Parden v. Terminal Railway* to the extent it held that Congress could statutorily abrogate Eleventh Amendment immunity through something less than unmistakably clear language. The *Welch* decision, however, did not upset *Parden's* holding that a state's participation in a federal program could give rise to a waiver of immunity. In fact a plurality of the Court has subsequently indicated its acceptance of this principle by stating "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, *or by otherwise waiving its immunity to suit in the context of a particular federal program.*" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (emphasis added).

The waiver of a state's immunity by its participation in a bankruptcy proceeding has long been recognized, not only under the Code, but under the former Bankruptcy Act as well. In *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) the state was deemed to have waived any Eleventh Amendment immunity when it intervened and asserted a claim to the fund in controversy. Similarly, in *Gardner v. New Jersey*, 329 U.S. 565, 574-75 (1947), *reh'g denied* 330 U.S. 853 (1947), the Court applied the traditional rule that a state which invokes the aid of the bankruptcy court subjects itself to and must abide by the procedures of that court. The Court went on to hold that by filing a proof of claim and seeking its allowance, the "State becomes the actor . . . [and] waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574 (citations omitted). The *Gardner* Court held that in light of the state's participation, there was no collision between Section 77 of the former Bankruptcy Act and the constitutional protections of sovereign immunity. *Id.* More recently, this well established exception to sovereign immunity has been codified in Section 106(a) of the Bankruptcy Code, which was enacted "to prevent a government unit from receiving a 'distribution from the estate without subjecting itself to any liability it has to the estate' arising from the same transaction or occurrence upon which its right to distribution is based." *Prudential Lines, Inc. v. United States Maritime Admin. (In re Prudential Lines, Inc.)*, 79 Bankr. 167, 180 (Bankr. S.D.N.Y. 1987) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5815-16, 6274). *See also West Virginia v. Hassett (In re O.P.M. Leasing Serv., Inc.)*, 21 Bankr. 993, 1001 (Bankr. S.D.N.Y. 1982); *Texaco v. Louisiana Land and Exploration Co.*, 113 Bankr. at 934; *Saint Joseph's Hosp. v. Department of Public Welfare (In re Saint Joseph's Hospital)*, 103 Bankr. 643, 650 (Bankr. E.D. Pa. 1989); *In re Lile*, 96 Bankr. 81, 83-84 (Bankr. S.D.Tex. 1989).

B. WAIVER BY ABROGATION

Notwithstanding participation and consent by a state, Congress can abrogate or override Eleventh Amendment immunity by enacting a statute under certain of its plenary powers granted by the Constitution. As with waiver by participation, Congress may abrogate a state's constitutionally secured immunity "only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242; *Dellmuth v. Muth*, ____ U.S. ____, 109 S.Ct. 2397 (1989) (citations omitted). Thus, in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court found that Congress had the authority to abrogate a state's Eleventh Amendment immunity when legislating pursuant to Section 5 of the Fourteenth Amendment. Congress can also abrogate a state's immunity when it enacts statutes pursuant to its Article I powers under the Commerce Clause. *See Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273, 2277 (1989). In *Hoffman v. Connecticut Dep't of Income Maintenance*, ____ U.S. ____, 109 S.Ct. 2818, 2824 (1989), the Supreme Court had the opportunity, but expressly declined, to decide whether Congress, under the Bankruptcy Clause of Article I, had the authority to abrogate a state's immunity by enacting section 106 of the Bankruptcy Code.

In *Hoffman*, the State of Connecticut had not filed any claims against the debtor's estate, precluding waiver by participation. The debtor, who sought to recover a money judgment against Connecticut, relied on section 106(c) of the Bankruptcy Code which "binds" governmental units to determinations made by the court. The Supreme Court found, however, that the language of section 106(c) did not make it unmistakably clear that Congress intended to subject a state to monetary recovery (as opposed to declaratory or injunctive relief) when it had not filed a proof of claim. 109 S.Ct. at 2823. Because it found the requisite language of waiver absent, the Court declined to address whether Congress had the authority under the Bankruptcy Clause to abrogate a state's immunity. *Id.* at 2824; *see also Union Gas*, 109 S.Ct. at 2277 (if statutory language does not contain clear expression of intent, constitutional ques-

tion of Congress's authority to abrogate immunity need not be considered).

C. WAIVER OF IMMUNITY IN THIS PROCEEDING

Before applying the concepts of waiver by participation and waiver by abrogation, I must note that the validity of any distinction between the two theories has been called into question. In his dissent in *Union Gas*, Justice Scalia discussed the waiver by participation theory espoused in *Parden v. Terminal Railway* and stated:

> to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate, is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers . . .

Union Gas, 109 S.Ct. at 2303 (Scalia, J., dissenting) (footnote omitted). To Justice Scalia, there was no more than a semantical difference between saying that Congress abrogated Eleventh Amendment immunity in suits based on certain activity or that the State's participation in that activity constituted a waiver of its privilege. Under either label, Justice Scalia asserted, Congress was attempting to accomplish the same goal of using its Article I powers to circumvent the bar imposed by the Eleventh Amendment. Being of the opinion that Article I does not grant Congress that authority, Justice Scalia maintained neither waiver by participation nor abrogation could be relied on to subject a state to a private cause of action in federal court. *See also Hoffman*, 109 S.Ct. at 2824 (Scalia, J., dissenting) (Congress does not have the authority under the Bankruptcy Clause to override a state's sovereign immunity). Although adopted by several other Justices, Justice Scalia's view did not command a majority of the Court in either *Union Gas* or *Hoffman*, and thus does not disturb the authority relied on in this decision. *See also Texaco v. Louisiana Land*, 113 Bankr. at 935.

The federal statute which furnishes the grounds for waiver of New York's immunity is Section 106 of the Bankruptcy Code. Section 106 provides in pertinent part:

> Waiver of sovereign immunity
>
> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

In their brief and oral argument, both parties focused on the language of section 106(b) and its provisions for offsetting unrelated claims, because New York had not as of that time filed a claim for the Gains Tax. But New York subsequently filed amended claim no. 300, which includes a request for Gains Tax liability and penalties and interest accruing from January 13, 1989 to September 23, 1989. The focus of the waiver argument therefore shifts from section 106(b) to section 106(a), which deals with claims filed by a state arising out of the same transaction for which a debtor seeks monetary recovery.

Consideration of New York's subsequently filed claim is appropriate, as "[w]aivers . . . often control past events." *WJM v. Massachusetts*, 840 F.2d at 1004. In *WJM*, the circuit court discovered that the State of Massachusetts filed related proofs of claim three months after the bankruptcy court heard oral argument but before judgment was entered in the debtor's adversary proceeding seeking a money judgment from the state. It was unclear from the record below whether either the bankruptcy court or the district court on appeal was aware of the related claims having been filed. The circuit court, in response to Massachusetts' Eleventh Amendment defense, held that the subsequent filing of the proofs of claim was tantamount to a declaration by the state that it had waived immunity to suit in federal court. *Id.* at 1004. The *WJM* court further jus-

tified consideration of claims not included in the record below because the issue of sovereign immunity touched upon the jurisdictional scope of appellate court review. Given the likelihood of appeal in a suit of this financial magnitude and the precedent it will set, these same concerns warrant consideration of New York's subsequently filed claim for the Gains Tax.

In no more plain language than it used could Congress have expressed its intention to condition New York's participation and receipt of a distribution in the Debtor's bankruptcy case on a waiver of immunity. By captioning the section "Waiver of Sovereign Immunity", Congress made a direct textual reference to its intent. The Supreme Court, in *dicta*, acknowledged that the language of section 106(a) is carefully crafted to waive sovereign immunity when the state files a proof of claim related to the transaction in controversy. *Hoffman*, 109 S.Ct. at 2822 (plurality opinion); *accord*, *WJM*, 840 F.2d at 1003 (Section 106(a) gives notice that by choosing to file a claim and enter the bankruptcy court's exclusive domain, a state must pay the price of waiving immunity).

Similarly, Congress's intent to abrogate immunity under its Article I powers is beyond serious question, as section 106(a) applies to a very narrow class of entities deemed "government units," which are defined essentially as the federal government, a state or other foreign or domestic government and their agencies. 11 U.S.C.A. § 101 (26) (West Supp.1990). The statute does not authorize suit against *any* potential litigant but addresses only three classes of sovereigns, thereby distinguishing section 106(a) from the overly broad statutes which have been found not to waive immunity. *Compare Atascadero*, 473 U.S. at 246, (no waiver of immunity in statute providing monetary damages against "any recipient of Federal assistance"); *Employees of the Dep't of Public Health and Welfare v. Missouri*, 411 U.S. 279, 283 (1973) (statute allowing suit against "any employer" did not subject state to private cause of action in federal court) *with Union Gas*, 109 S.Ct. at 2278 (statute's express inclusion of "States" within its definition of "Persons" liable for environmental cleanup costs conveyed

message of unmistakable clarity that immunity had been waived).

New York cannot and has not contended that the wording of section 106(a) provides inadequate notice of Congress's intent to condition participation on waiver or to abrogate a state's immunity when a related claim is filed, as no other plausible reading exists. Indeed, New York has conceded that a state can waive its immunity by participating in a bankruptcy proceeding. In its supplemental memorandum of law in support of its motion to dismiss, at p. 14, New York cites to *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947) for the proposition that section 106(a) incorporates the traditional bankruptcy rule that waiver by participation occurs when a state files a proof of claim and demands its allowance. New York admitted, before it filed its claim for the Gains Tax, that it had consented to the adjudication of those taxes for which it had already filed proofs of claim. Supplemental memorandum at 15. This concession, coupled with the subsequent filing of an amended proof of claim for the Gains Tax, is enough to defeat New York's immunity defense. It is therefore unnecessary to reach the constitutional questions which New York had propounded before it filed its amended claims. Similarly, in light of the applicability of section 106(a), I need not address the other statutory grounds which the Debtor asserts as sufficient jurisdictional underpinning to effect a setoff under section 106(b). Accordingly the Debtor's motion for summary judgment is granted and New York is directed to refund the Gains Tax payment made under protest. New York's cross-motion for summary judgment for failure to state a claim is denied.

SETTLE ORDER consistent with this decision.

Dated: New York, New York
July 13, 1990

/s/ TINA L. BROZMAN
United States Bankruptcy Judge

APPENDIX

STATE OF NEW YORK
Department of
Taxation and Finance
Albany, New York 12227
Law Bureau
State Campus,
Albany, New York 12227
September 21, 1983

Dear :

This letter is in reply to your inquiries of June 9 and June 27, 1983 concerning Article 31-B of the Tax Law, the New York Real Property Transfer Gains Tax. You had questions as to the treatment of the tax for State corporate franchise and personal income tax purposes, and as to how the "acquisition of controlling interest" provisions of the tax are to be applied.

In order to determine the deductibility of the gains tax for corporate franchise and personal income tax purposes, the tax must first be classified. The New York State Real Property Transfer Gains Tax is a levy on gains derived from the transfer by any method of an interest in real property located in New York where the consideration is one million dollars or more.

The State gains tax is a transfer tax rather than a property or income tax since the triggering mechanism of the tax is the transfer of real property. Whereas the gains tax is a tax upon the transfer of real property, a property tax is a levy on the property itself. Income taxes are generally applied to net gain. Under the gains tax, the loss from one transfer of real property does not effect the applicability of the gains tax to another transfer of real property in the same tax year. For these reasons, it is our opinion that the State gains tax should be classified as a State transfer tax and should be treated as such for purposes of deductibility.

It should be noted, however, that though the Department's views are expressed herein, the Internal Revenue Service will

ultimately determine the deductibility of the gains tax for Federal tax purposes, and that State tax policy is usually formulated in accordance with the Federal treatment of the tax. It is our opinion, in light of Revenue Ruling 80-121, that the Internal Revenue Service will classify the gains tax as being a transfer tax. In that ruling, Vermont's land gains tax, as imposed by sections 10001 through 10010, Title 32, of the Vermont Statutes Annotated, was deemed to be a transfer tax. The Vermont land gains tax is conceptually similar to New York's gains tax in that the Vermont statute levies a tax on gain from the sale or exchange of land. Under their statute, a sale or exchange of land is any transfer of title to land for a consideration, and taxable gain is the amount realized from a sale or exchange of land, less the transferor's basis in the land.

Section 164(a) of the Internal Revenue Code describes various types of taxes that are allowed as a deduction for the taxable year within which paid or accrued. Specifically allowed are: (1) State and local real property taxes; (2) State and local personal property taxes; (3) State and local income taxes; and (4) State and local general sales taxes. Section 164(a) of the Code also allows, as a deduction, State and local taxes not specifically described that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for the production of income).

In determining that the Vermont land gains tax is a transfer tax, Revenue Ruling 80-121 first distinguished other forms of taxes as not being applicable. The Ruling provides, in pertinent part, as follows:

> "The Vermont land gains tax is not imposed or triggered by the ownership of real property, but rather, by the exercise of one of the incidents of property ownership, the transfer of real property at a gain. The land gains tax is not measured by the value of the real property, but rather, by the gain derived from the transfer of that property . . . . Thus, the land gains tax is not a real property tax within the meaning of section 164(a)(1) of the Code."

With respect to the Vermont land gains tax qualifying as a State income tax within the meaning of section 164(a)(3) of the Code, the Revenue Ruling distinguishes the land gains tax from Federal income taxes, stating that the State tax, unlike the Federal income tax, is not structured to fall on net gain. The taxpayer, as a result of the gains tax, cannot reduce taxable gain from sales or exchanges of land during the taxable year by any losses from other sales or exchanges of land during that year. Under Federal income tax law, taxpayers are allowed to reduce gains from sales or exchanges of land by losses from sales or exchanges of land. Noting that a taxpayer could be required to pay the land gains tax even though under Federal income tax laws that same taxpayer may have a net loss from sales or exchanges of land, the ruling concluded that the tax is not an income tax under section 164(a)(3) of the Code.

In light of Revenue Ruling 80-121, it is the Department's opinion that the New York State Real Property Transfer Gains Tax is a transfer tax, and for purposes of Federal deductibility, the tax is deductible for purposes of computing adjusted gross income under section 164(a) of the Internal Revenue Code only to the extent that it is paid or accrued within the taxable year in carrying on a trade or business, or in connection with an activity described in section 212 of the Internal Revenue Code relating to expenses for the production of income.

For State income tax purposes, section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income, with certain modifications. Since the State gains tax will be deductible for purposes of computing Federal adjusted gross income, it will automatically be excluded from the computation of New York adjusted gross income, since there is no provision in the Tax Law adding back such amounts for purposes of such computation. A similar provision is found in Article 9-A of the Tax Law, the corporate franchise tax. Section 208 defines "entire net income" to mean total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department. Since the State gains tax will be

deducted from the taxable income the taxpayer is required to report to the United States Treasury Department, the tax will automatically be excluded from the computation of the state franchise tax since there is no provision adding it back for purposes of computing entire net income.

With regard to your inquiry as to how the acquisition of controlling interest provisions of the tax are to be applied, one must look to what is acquired, not to what is maintained. The tax is imposed on gains from the transfer of any interest in real property, which is defined to include "acquisition of a controlling interest" in any entity with an interest in real property. (Tax Law, § 1440.7) The term "controlling interest" is defined in section 1440.2 of the Tax law to mean:

> "(i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and
> (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity."

The key term in these provisions is "acquisition". For purposes of the gains tax, if no partner acquires a controlling interest in the partnership, there is no transfer subject to the tax. In the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when an individual, group of individuals acting in concert to avoid the tax, or another entity becomes the owner of 50% or more of the voting stock in such corporation. Because the statute looks to the acquisition of the controlling interest, it is the act of the transferee which triggers the tax.

For your further information, I am enclosing a copy of Publication 588 containing questions and answers on the gains tax or real property transfers.

Very truly yours,

JOHN P. DUGAN
Deputy Commissioner and Counsel

TWS/cjm
Enclosure

STATE OF NEW YORK
Department of
Taxation and Finance
Albany, New York 12227
Law Bureau
State Campus,
Albany, New York 12227
November 14, 1983

Dear :

This letter is in response to your inquiry of September 23, 1983 regarding Article 31-B of the Tax Law, The New York Real Property Transfer Gains Tax. You asked whether the payment of tax pursuant thereto would avail the taxpayer of a credit or deduction for partnership or individual income tax purposes. It is our opinion that, if anything, a deduction would be allowed.

The treatment of taxes for such purposes largely depends upon the classification of the tax. Comparably classified taxes generally receive similar deduction treatment. The New York State Real Property Transfer Gains Tax is a levy on gains derived from the transfer by any method of an interest in real property located in New York where the consideration is one million dollars or more.

The tax is classified by New York as a transfer tax rather than a property tax because it is triggered by the transfer of the property, not by other incidents of ownership, and not levied on the land itself.

It should be noted, however, that though the Department's views are expressed herein, the Internal Revenue Service will ultimately determine the deductibility of the gains tax for Federal tax purposes, and that State tax policy is usually formulated in accordance with the Federal treatment of the tax. It is our opinion, in light of Revenue Ruling 80-121, that the Internal Revenue Service will classify the gains tax as being a transfer tax. In that ruling, Vermont's land gains tax, as imposed by sections 10001 through 10010, Title 32, of the Vermont

Statutes Annotated, was deemed to be a transfer tax. The Vermont land gains tax is conceptually similar to New York's gains tax in that the Vermont statute levies a tax on gain from the sale or exchange of land. Under their statute, a sale or exchange of land is any transfer of title to land for a consideration, and taxable gain is the amount realized from a sale or exchange of land, less the transferor's basis in the land.

Section 164(a) of the Internal Revenue Code describes various types of taxes that are allowed as a deduction for the taxable year within which paid or accrued. Specifically allowed are: (1) State and local real property taxes; (2) State and local personal property taxes; (3) State and local income taxes; and (4) State and local general sales taxes. Section 164(a) of the Code also allows, as a deduction, State and local taxes not specifically described that are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for the production of income).

In determining that the Vermont land gains tax is a transfer tax, Revenue Ruling 80-121 first distinguished other forms of taxes as not being applicable. The Ruling provides, in pertinent part, as follows:

> "The Vermont land gains tax is not imposed or triggered by the ownership of real property, but rather, by the exercise of one of the incidents of property ownership, the transfer of real property at a gain. The land gains tax is not measured by the value of the real property, but rather, by the gain derived from the transfer of that property . . . . Thus, the land gains tax is not a real property tax within the meaning of section 164(a)(1) of the Code."

With respect to the Vermont land gains tax qualifying as a State income tax within the meaning of section 164(a)(3) of the Code, the Revenue Ruling distinguishes the land gains tax from Federal income taxes, stating that the State tax, unlike the Federal income tax, is not structured to fall on net gain. The taxpayer, as a result of the gains tax, cannot reduce taxable gain from sales or exchanges of land during the taxable year by any

losses from other sales or exchanges of land during that year. Under Federal income tax law, taxpayers are allowed to reduce gains from sales or exchanges of land by losses from sales or exchanges of land. Noting that a taxpayer could be required to pay the land gains tax even though under Federal income tax laws that same taxpayer may have a net loss from sales or exchanges of land, the ruling concluded that the tax is not an income tax under section 164(a)(3) of the Code.

In light of Revenue Ruling 80-121, it is the Department's opinion that the New York State Real Property Transfer Gains Tax is a transfer tax, and for purposes of Federal deductibility, the tax is deductible for purposes of computing adjusted gross income under section 164(a) of the Internal Revenue Code only to the extent that it is paid or accrued within the taxable year in carrying on a trade or business, or in connection with an activity described in section 212 of the Internal Revenue Code relating to expenses for the production of income.

For State income tax purposes, section 612 of the Tax Law provides that the New York adjusted gross income of a resident individual means his Federal adjusted gross income, with certain modifications. Since the State gains tax will be deductible for purposes of computing Federal adjusted gross income, it will automatically be excluded from the computation of New York adjusted gross income, since there is no provision in the Tax Law adding back such amounts for purposes of such computation. A similar provision is found in Article 9-A of the Tax Law, the corporate franchise tax. Section 208 defines "entire net income" to mean total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department. Since the State gains tax will be deducted from the taxable income the taxpayer is required to report to the United States Treasury Department, the tax will automatically be excluded from the computation of the state franchise tax since there is no provision adding it back for purposes of computing entire net income.

For your further information, I am enclosing a copy of Publication 588 containing questions and answers on the gains tax or real property transfers.

Very truly yours,

JOHN P. DUGAN
Deputy Commissioner and Counsel

LMP:pbc
Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number: 91-5038

FILED MAY 29, 1992

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of May, one thousand nine hundred and ninety-two.

IN RE: 995 FIFTH AVENUE ASSOCIATES, L.P.,

Debtor.

---

995 FIFTH AVENUE ASSOCIATES, L.P.,

Plaintiff-Appellee,

—v.—

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES W. WETZLER, as Commissioner of Taxation and Finance; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellee 995 Fifth Avenue Associates, L.P.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

UNITED STATES CODE

Title 11 Bankruptcy

§ 1146. Special tax provisions

* * *

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

* * *

CODE OF ALABAMA

Title 40 Revenue and Taxation

Chapter 22 Recordation Tax

§ 40-22-1. Deeds, bills of sale, etc.

No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, the re-recordation of corrected mortgages, deeds or instruments executed for the purpose of perfecting the title to real or personal property, specifically, but not limited to, corrections of maturity dates thereof, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record: Upon all such instruments which are executed to convey real or personal property situated in this state of the value of $500.00 or less there shall be paid the sum of $.50, and upon all such instruments executed to convey real or personal property situated in this state of more than $500.00 in value there shall be paid the sum of $.50 for each $500.00 or fraction thereof in value of property conveyed by such instrument; provided, that only the value in excess of any mortgages or vendor's lien upon any property within this state on which the mortgage tax has been paid shall be taxable under this section; and provided further, that where several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable under this section.

* * *

DELAWARE CODE

Title 30 State Taxes

Chapter 54 Realty Transfer Tax

§ 5402. Rate of tax; when payable; exception

(a) Every person who makes, executes, delivers, accepts or presents for recording any document, except as defined or described in § 5401(4) of this title, or in whose behalf any document is made, executed, delivered, accepted or presented for recording shall be subject to pay for and in respect to the transaction, or any part thereof, a realty transfer tax at the rate of 2 percent of the value of the property represented by such document, which tax shall be payable at the time of making, execution, delivery, acceptance or presenting of such document for recording. Said tax is to be apportioned equally between grantor and grantee.

(b) No tax shall be imposed on conveyances when the actual value of the property being transferred is less than $100.

(c) Notwithstanding subsection (a) of this section, where a valid written contract is entered into prior to August 1, 1971, the tax for such a transfer shall be at the rate imposed prior to August 1, 1971.

(d) Every person who makes, executes, delivers, accepts or presents for recording any document defined or described in § 5401(4) of this title, or in whose behalf any such document is made, executed, delivered, accepted or presented for recording shall be subject to pay for and in respect to the transaction, or in any part thereof, a realty transfer tax at the rate of 2 percent of the value of the property represented by such document, which tax shall be payable as follows:

(1) The tax on the consideration attributed to the first year of the term shall be payable at the time of making, execution, delivery, acceptance or presenting of such document for recording;

(2) The tax on the consideration attributed to each successive year of the term thereafter shall be paid annually to the Division of Revenue.

(e) There shall be no tax imposed on any document described in § 5401(4) of this title entered into prior to July 7, 1973.

(f) Notwithstanding subsection (a) of this section, the rate of tax on documents described in § 5401(8) of this title shall be 1% on amounts exceeding $10,000, which shall be borne by the owner of the building whose construction is made subject to tax under § 5401(8).

ILLINOIS STATUTES

Chapter 120 Revenue

Real Estate Transfer Tax Act

1003. Imposition—Amount—Collection—Proceeds—Stamps—Declaration of buyer and seller

§ 3. A tax is imposed on the privilege of transferring title to real estate, as represented by the deed that is filed for recordation, and on the privilege of transferring a beneficial interest in real property which is the subject of a land trust as represented by the trust document that is filed for recordation, at the rate of 50¢ for each $500 of value or fraction thereof stated in the declaration provided for in this Section. If, however, the real estate is transferred subject to a mortgage the amount of the mortgage remaining outstanding at the time of transfer shall not be included in the basis of computing the tax.

* * *

MASSACHUSETTS GENERAL LAWS

Title IX Taxation

Chapter 64D. Excise on Deeds, Instruments and Writings

§ 1. Rate of taxation; instrument excepted

There shall be levied, collected and paid, for and in respect of the deeds, instruments and writings hereinafter mentioned and described, or for or in respect of the vellum, parchment or paper upon which such deeds, instruments or writings, or any of them, are written or printed, the excise taxes herein specified:— Deed, instrument or writing, whereby any lands, tenements or other realty sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her or their direction, when the consideration of the interest or property conveyed exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one hundred dollars and does not exceed five hundred dollars, one dollar, and for each additional five hundred dollars or fractional part thereof, one dollar. Notwithstanding any other provisions of this section or any other general or special law to the contrary, Nantucket county may disburse and expend deposits in said Funds for the purpose of facilities and programs related to law enforcement, including the planning, improving or constructing of police stations and other related facilities and programs. This chapter shall not apply to any instrument or writing given to secure a debt or to any deed, instrument or writing to which the commonwealth, a city or town of the commonwealth, or the United States or any of their agencies are a party.

MINNESOTA STATUTES

Deed Tax

§ 287.21. Imposition of tax; determination of tax

Subdivision 1. There is hereby imposed on each deed, instrument, or writing by which any lands, tenements, or other realty in this state shall be granted, assigned, transferred or otherwise conveyed, a tax determined in the following manner. When transfers are made by instruments pursuant to mergers, consolidations, sales or transfers of substantially all of the assets of corporations pursuant to plans of reorganization or there is no consideration or when the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, is $500 or less, the tax shall be $1.65. When the consideration, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $500, the tax shall be $1.65 plus $1.65 for each additional $500 or fraction of that amount.

The tax applies against the total consideration, including the fair market value consideration for any personal property located on the real property conveyed by the deed and transferred as part of the total consideration, but excluding the value of any lien or encumbrance remaining on the property at the time of sale.

* * *

NEW YORK REAL PROPERTY ACTIONS & PROCEEDINGS LAW

Article 13—Action to Foreclose a Mortgage

§ 1354. Distribution of proceeds of sale

1. The officer conducting the sale shall pay, out of the proceeds, unless otherwise directed, the expenses of the sale, and pay to the plaintiff, or his attorney, the amount of the debt, interest and costs, or so much as the proceeds will pay and take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale.

2. The officer conducting the sale shall pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments, and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. In any city having a population of one million or more, such officer shall pay out of the proceeds any liens or encumbrances placed by a city agency upon the real property which have priority over the foreclosed mortgage. The sums necessary to make those payments and redemptions are deemed expenses of the sale. The provisions of this subdivision shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder.

3. The officer conducting the sale after fully complying with the provisions of subdivisions one and two of this section and if the judgment of sale has so directed shall pay to the holder of any subordinate mortgage or his attorney from the then remaining proceeds the amount then due on such subordinate mortgage, or so much as the then remaining proceeds will pay and take the receipt of the holder, or his attorney for the amount so paid, and file the same with his report of sale.

4. When the sum of the amount of the proceeds before any distributions are made under this section and the amount of any

other liens which the real property is taken subject to is one million dollars or more, the officer conducting the sale shall pay, out of the proceeds remaining after the provisions of subdivisions one, two and three of this section have been complied with, the amount of tax on gains derived from certain real property transfers due from the defendant pursuant to article thirty-one-B of the tax law to the state tax commission. Such amount shall be ten per centum of the sum of the amount of the proceeds before any distributions are made under this section and the amount of any other liens which the real property is taken subject to, unless the defendants shall furnish the officer conducting the sale a statement of tentative assessment or statement of no tax due issued by the state tax commission, in which case the officer shall pay over to the state tax commission the amount stated on such tentative assessment or statement of no tax due. The officer conducting the sale shall, along with such payment, file returns and information in accordance with procedures established by the state tax commission.

5. All surplus moneys arising from the sale shall be paid into court by the officer conducting the sale within five days after the same shall be received.

NEW YORK TAX LAW

Article 31—Real Estate Transfer Tax

§ 1402. Imposition of tax

A tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars, at the rate of two dollars for each five hundred dollars or fractional part thereof; provided, however, that with respect to (A) a conveyance of a one, two or three-family house and an individual residential condominium unit, or interest therein; and (B) conveyances where the consideration is less than five hundred thousand dollars, the consideration for the interest conveyed shall exclude the value of any lien or encumbrance remaining thereon at the time of conveyance.

Article 31-B–Tax on Gains Derived from Certain Real Property Transfers

§ 1440. Definitions

In this article:

1. (a) "Consideration" means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor, including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to. Consideration includes the cancellation or discharge of an indebtedness or obligation.

(b) In the case of (i) the granting of an option with use and occupancy of real property or (ii) the creation of a leasehold or sublease that is a transfer of real property, as defined in sub-

division seven of this section, consideration shall also include the value of the rental and other payments attributable to the use and occupancy of the real property or interest therein and the value of any option to purchase or renew included in such transfer.

(c) In the case of a transfer which includes other assets which are in addition to real property or an interest therein and for which there is no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the fair market value of such real property or interest. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest.

2. "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

3. "Gain" means the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

4. "Interest" when used in connection with real property includes, but is not limited to, title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property. Interest shall also include an option or contract to purchase real property.

5. (a) "Original purchase price" means the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property and those customary, reasonable and necessary expenses incurred to create ownership interests in property in cooperative or condominium form, as such fees and expenses are determined under rules and regulations prescribed by the tax commission.

(b) In the case of a transfer of real property by a gift, devise, bequest or inheritance, the original purchase price of the real property in the hands of the transferee immediately after the transfer shall be the same as the original purchase price of such property in the hands of the transferor immediately before the transfer.

(c) The transferee of every transfer of real property for which exemption is granted, pursuant to subdivision one of section fourteen hundred forty-three of this article on the basis that no consideration was paid for such transfer, shall be bound by a determination of original purchase price as determined under paragraph (b) of this subdivision, if such transferee participated in filing the form upon which such exemption was granted.

(d) In the case of the creation of a lease or option with use and occupancy, the original purchase price means the amount described in paragraph (a) of this subdivision which relates to the real property or interest therein which is being leased, multiplied by a fraction, the numerator of which is the value of the rental payments under the lease plus the amount paid for an option, if any, and the denominator of which is the fair market value of the real property.

(e) The consideration, described in paragraph (b) of subdivision one of this section, received by the lessor of a taxable lease shall become such lessor's original purchase price of the interest in the real property leased; provided, that such lessor paid the tax imposed by this article on such lease or is paying such tax pursuant to the installment payment provisions of section fourteen hundred forty-two of this article.

(f) In the case of the creation of a sublease, original purchase price includes the value of the remaining rental payments required to be made pursuant to the terms of the prime lease during the term of such sublease.

(g) In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the original purchase price of the interest in real property to the controlling interest for the purpose of ascertaining the original purchase price of such controlling interest.

6. "Real property" means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon and leaseholds, which are located in whole or in part within the state. For purposes of this article, there shall be apportionments of consideration and original purchase price in connection with the transfer of real property located partly within the state and partly without the state.

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or

sublease is for substantially all of the premises constituting the real property. Transfer of real property shall also include partial or successive transfers, unless the transferor or transferors furnish a sworn statement that such transfers are not pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, and the transfer of real property by tenants in common, joint tenants or tenants by the entirety, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to tranferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. For purposes of this article, transfers pursuant to a cooperative plan shall include all transfers of stock in a cooperative corporation which owns real property. Notwithstanding the foregoing, transfer of real property shall not include a transfer pursuant to devise, bequest or inheritance; the creation, modification, extension, spreading, severance, consolidation, assignment, transfer, release or satisfaction of a mortgage, a mortgage subordination agreement, a mortgage severance agreement, an instrument given to perfect or correct a recorded mortgage; or a release of lien of tax pursuant to this chapter or the internal revenue code of nineteen hundred fifty-four, as amended.

8. "Person" means an individual, corporation, partnership, association, trust, estate or other entity, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform an act required under this article.

9. "Person liable for the tax" means a person who is personally liable for the tax whether as a tranferor or as a transferee pursuant to paragraph (a) of subdivision three of section fourteen hundred forty-seven of this article.

§ 1441. Imposition of tax

A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

§ 1447. Filings and procedures

* * *

1. (f)(1) A county clerk or register of a county shall not record or accept for record any conveyance, other than a conveyance by a court of appropriate jurisdiction, or an officer thereof, resulting from an action to foreclose a mortgage, of real property in New York state, unless accompanied by:

(i) the statement of tentative assessment of the amount of tax or statement that no tax is due provided pursuant to subdivision two of this section, together with the payment of the tentative assessment of the amount of tax, if any, or

(ii) an affidavit, or other form prescribed by the state tax commission, fully executed under penalty of perjury, affirming (A) that the transfer of real property is exempt under subdivision seven of section fourteen hundred forty-three of this article or (B) that the transfer is a transfer of real property where the consideration is less than five hundred thousand dollars and is not a partial or successive transfer of real property or (C) that the transfer is a transfer of real property by tenants in common, joint tenants or tenants by the entirety where the aggregate consideration is less than five hundred thousand dollars or (D) that the conveyance is not a transfer of real property within the meaning of subdivision seven of section fourteen hundred forty of this article, together with documents supporting such claim, or (E) that the transferor is exempt under paragraph (a) or (b) of subdivision three of section fourteen hundred forty-three of this article or (F) that the transfer of real property is exempt under subdivision two of section fourteen hundred forty-three of this article.

* * *

3. (a) Whenever the transferor or transferee shall fail to give such pertinent affidavits and other information to the department of taxation and finance as required by this section, or whenever such department shall inform the transferee that a tentative assessment of such tax exists, any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor shall be subject to a first priority right for any such taxes stated to be due from the transferor to the state in such tentative assessment, and (except as provided in paragraphs (b) and (c) of this subdivision) the transferee is forbidden to transfer to the transferor any such sums of money, property or consideration to the extent of the amount of the state's claim stated in such tentative assessment, whether or not the transferor has represented to, or informed the transferee that, he owes any tax pursuant to this article, and whether or not the transferee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. Whenever the department shall fail to give such statement of a tentative assessment of such tax to the transferor and the transferee, within twenty days from receipt of such pertinent affidavits and such other information, such failure will release the transferee from any further obligation to withhold any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor; except that with respect to matters pending on the effective date of this article such twenty day period shall not begin to run until ninety days after the effective date of this article. For the transferee's failure to comply with the provisions of this subdivision, the transferee (except as provided in paragraphs (b) and (c) of this subdivision) shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor; provided, however, in a case where no tentative assessment has been issued because the transferee did not file the required questionnaire, or the transferee supplies willfully false or fraudulent information, the transferee shall be personally liable for the taxes stated to be due in a notice of determination, except that the liability of the transferee shall be further limited to the sums of money, prop-

erty or other consideration which the transferee is required to transfer over to the transferor, and such liability may be assessed and enforced in the same manner as the liability for tax under this article. Upon receipt of such statement of tentative assessment mailed or delivered within the twenty days as aforesaid of the notice of the stated amount of the state's claim from the department, and demand for payment thereof, the transferee may make payment of such claim to the state from any sums of money, property, or consideration withheld in accord with the provisions of this paragraph, except that such payment shall be limited to the sums of money, property or other consideration which the transferee is required to transfer over to the transferor, and upon making the payment, such transferee shall be relieved of all liability for such amounts to the transferor, and such amounts paid to the state shall be deemed satisfaction of the tax liability of the transferor, to the extent of the amount of such payment.

(b) Notwithstanding paragraph (a) of this subdivision, the transferee in an action to foreclose a mortgage is not forbidden to transfer the consideration to the officer conducting the sale, and the transferee shall be released from personal liability for taxes determined to be due from the mortgagor under this article.

(c) Notwithstanding paragraph (a) of this subdivision, the transferee is not forbidden to transfer the consideration to the transferor and the transferee shall be released from personal liability where a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state and acceptable to the tax commission is filed with such commission conditioned upon payment of the balance of tax due on which the transferee is liable.

(d) Where the liability of a transferee, for the payment to the state of any such taxes determined to be due from the transferor, has been wholly paid or satisfied or no longer exists, the tax commission shall mail to such transferee a notice, addressed to his last known address, setting forth that such lia-

bility has been wholly paid or satisfied or no longer exists. The tax commission shall include in such notice the following additional information:

(1) the name and last known address of the transferee;

(2) the amount of the tax paid, satisfied or vacated; and

(3) a statement to the effect that consumer reporting agencies must delete from a credit file any reference to the particular tentative tax assessment within thirty days of receipt from the transferee of such notice. Provided, however, no order or decree in a bankruptcy proceeding shall be construed as giving rise to the requirement that the notice provided for in this paragraph be given.

ADMINISTRATIVE CODE AND CHARTER OF THE CITY OF NEW YORK

Chapter 21 Real Property Transfer Tax

§ 11-2102 Imposition of tax. a. A tax is hereby imposed on each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceed twenty-five thousand dollars. The tax shall be:

* * *

(9) with respect to conveyances made on or after August first, nineteen hundred eighty-nine (other than grants, assignments or surrenders of leasehold interests in real property taxable as provided in paragraph ten of this subdivision), the tax shall be at the following rates:

(i) at the rate of one percent of the consideration for conveyances of one, two or three-family houses and individual residential condominium units where the consideration is five hundred thousand dollars or less, and at the rate of one and four hundred twenty-five thousandths of one percent of the consideration for such conveyances where the consideration is more than five hundred thousand dollars, and

(ii) at the rate of one and four hundred twenty-five thousandths of one percent of the consideration with respect to all other conveyances where the consideration is five hundred thousand dollars or less, and at the rate of two and six hundred twenty-five thousandths of one percent where the consideration for such conveyances is more than five hundred thousand dollars:

(10) With respect to a grant, assignment or surrender of a leasehold interest in real property made on or after August first, nineteen hundred eighty-nine, the tax shall be at the following rates:

(i) at the rate of one percent of the consideration for the granting, assignment or surrender of a leasehold interest in a one, two or three-family house or an individual dwelling unit in a dwelling which is to be occupied or is occupied as the residence or home of four or more families living independently of each other where the consideration is five hundred thousand dollars or less, and at the rate of one and four hundred twenty-five thousandths of one percent of the consideration where the consideration for granting, assignment or surrender or such leasehold interest is more than five hundred thousand dollars, and

(ii) at the rate of one and four hundred twenty-five thousandths of one percent of the consideration for the granting, assignment or surrender of a leasehold interest in all other real property where the consideration is five hundred thousand dollars or less, and at the rate of two and six hundred twenty-five thousandths of one percent of the consideration where the consideration for the granting, assignment or surrender of such a leasehold interest is more than five hundred thousand dollars;

(iii) provided, however, that for purposes of subparagraphs (i) and (ii) of this paragraph, the amount subject to tax in the case of a grant of a leasehold interest shall be only such amount as is not considered rent for purposes of the tax imposed by chapter seven of this title.

* * *

PENNSYLVANIA STATUTES

Article XI-C. Realty Transfer Tax

§ 8102-C. Imposition of tax

Every person who makes, executes, delivers, accepts or presents for recording any document or in whose behalf any document is made, executed, delivered, accepted or presented for recording, shall be subject to pay for and in respect to the transaction or any part thereof, or for or in respect of the vellum parchment or paper upon which such document is written or printed, a State tax at the rate of one per cent of the value of the real estate represented by such document, which State tax shall be payable at the earlier of the time the document is presented for recording or within thirty days of acceptance of such document or within thirty days of becoming an acquired company.

PHILADELPHIA CODE

Chapter 19-1400 Realty Transfer Tax

§ 19-1403. Imposition of Tax—(1) Every person who transfers ownership of real estate situate within the City or who makes, executes, delivers, accepts or presents for recording any document or in whose behalf any document is made, executed, delivered, accepted or presented for recording, or who accepts ownership of real estate situate within the City, shall be subject to pay for and in respect to the transaction or any part thereof, or for or in respect of the vellum parchment or paper upon which such document is written or printed, a tax based on the value of the real estate represented by such document, which tax shall be payable at the earlier of the time the document is presented for recording or within thirty (30) days of acceptance of such document or within thirty (30) days of becoming an acquired real estate company or family farm corporation. For documents made, executed, delivered or accepted or presented for recording during each of the following fiscal years, the amount of tax shall be computed by multiplying the value of the real estate represented by such document by the following rates of tax:

(a) four and seven one-hundredths percent (4.07%) for the fiscal year of the City commencing July 1, 1988 and ending June 30, 1989. Provided that, in the event that a court of competent jurisdiction enters a final order from which all appeals have been exhausted, determining that City Council lacked the authority to impose this rate effective July 1, 1988, the rate shall revert to two and one-half percent (2.5%) for the fiscal year commencing July 1, 1988 and ending June 30, 1989;

(b) four and seven one-hundredths percent (4.07%) for the fiscal year of the City commencing July 1, 1989 and ending June 30, 1990;

(c) three and ninety-two one-hundredths percent (3.92%) for the fiscal year of the City commencing July 1, 1990 and ending June 30, 1991;

(d) three and sixty-nine one-hundredths percent (3.69%) for the fiscal year of the City commencing July 1, 1991 and ending June 30, 1992;

(e) three and forty-six one-hundredths percent (3.46%) for the fiscal year of the City commencing July 1, 1992 and ending June 30, 1993;

(f) three and twenty-three one-hundredths percent (3.23%) for the fiscal year of the City commencing July 1, 1993 and ending June 30, 1994; and

(g) three percent (3.0%) for the fiscal years of the City commencing July 1, 1994 and thereafter.

(2) The payment of the tax imposed herein shall be evidenced by the affixing of an official stamp or writing by the recorder whereon the date of the payment of the tax, amount of the tax and the signature of the collecting agent shall be set forth.

VERMONT STATUTES

Title 32 Taxation and Finance

Chapter 231 Property Transfer Tax

§ 9602. Tax on transfer of title to property

A tax is hereby imposed upon the transfer by deed of title to property located in this state. The amount of the tax equals one and one quarter percent of the value of the property transferred, or $1.00, whichever is greater, except as follows:

(1) with respect to the transfer of property to be used for the principal residence of the transferee the tax shall be imposed at the rate of five-tenths of one percent of the first $100,000.00 in value of the property transferred and at the rate of one and one quarter percent of the value of the property transferred in excess of $100,000.00;

(2) with respect to the transfer of property which is enrolled at the time of the transfer in a program under chapter 124 of this title, or is otherwise a working farm at the time of the transfer if not so enrolled, the tax shall be imposed in the amount of five-tenths of one percent on the entire value of the property transferred; provided, however that no part of the property is converted to a use which would subject it to the land use change tax or an obligation to repay property tax benefits under chapter 124 of this title for a period of three years following the date of the transfer, or if it is a working farm which is not enrolled under chapter 124, that the property is not taken out of agricultural production for a period of six years following the date of the transfer. For the purposes of this subdivision, a working farm shall mean a parcel of land in excess of 25 acres, actively used by a farmer, as that term is defined under section 3752(7) of this title. If the conditions of this subdivision are breached by the buyer, the buyer shall be obligated to pay the full transfer tax in the amount of one percent and this obligation shall run with the land.

WASHINGTON CODE

Title 82 Excise Taxes

Chapter 82.45 Excise Tax on Real Estate Sales

§ 82.45.060. Tax imposed on sale of property—Additional tax imposed

(1) There is imposed an excise tax upon each sale of real property at the rate of one and twenty-eight one-hundredths percent of the selling price. An amount equal to seven and seven-tenths percent of the proceeds of this tax to the state treasurer shall be deposited in the public works assistance account created in RCW 43.155.050.

(2) There is imposed an additional excise tax through June 30, 1989, upon each sale of real property at the rate of six one-hundredths of one percent of the selling price. The tax imposed under this subsection shall be deposited in the conservation area account under RCW 79.71.110.

Chapter 84.46—Counties and Cities—Excise Tax on Real Estate Sales

§ 82.46.010. Tax on sale of real property authorized—Limitations on use—Additional tax authorized—Maximum rates

(1) The governing body of any county or any city may impose an excise tax on each sale of real property in the unincorporated areas of the county for the county tax and in the corporate limits of the city for the city tax at a rate not exceeding one-quarter of one percent of the selling price. The revenues from this tax shall be used by the respective jurisdictions for local capital improvements, including those listed in RCW 35.43.040.

After July 1, 1990, revenues generated from the tax imposed under this subsection in counties and cities that are required or choose to plan under RCW 36.70A.040 shall be used primarily

for financing capital projects specified in a capital facilities plan element of a comprehensive plan and housing relocation assistance under RCW 59.18.440 and 59.18.450. However, revenues (a) pledged by such counties and cities to debt retirement prior to July 1, 1990, may continue to be used for that purpose until all outstanding debt is retired, or (b) committed prior to July 1, 1990, by such counties or cities to a capital project may continue to be used for that purpose until the project is completed.

(2) In lieu of imposing the tax authorized in RCW 82.14.030(2), the governing body of any county or any city may impose an additional excise tax on each sale of real property in the unincorporated areas of the county for the county tax and in the corporate limits of the city for the city tax at a rate not exceeding one-half of one percent of the selling price.

(3) Taxes imposed under this section shall be collected from persons who are taxable by the state under chapter 82.45 RCW upon the occurrence of any taxable event within the unincorporated areas of the county or within the corporate limits of the city, as the case may be.

(4) Taxes imposed under this section shall comply with all applicable rules, regulations, laws, and court decisions regarding real estate excise taxes as imposed by the state under chapter 82.45 RCW.

(5) As used in this section, "city" means any city or town.

§ 82.46.035. Additional tax—Certain counties—Ballot proposition—Use limited to capital projects—Temporary rescindment for noncompliance

(1) The governing body of any county or any city that plans under RCW 36.70A.040(1) may impose an additional excise tax on each sale of real property in the unincorporated areas of the county for the county tax and in the corporate limits of the city for the city tax at a rate not exceeding one-quarter of one percent of the selling price. Any county choosing to plan under

RCW 36.70A.040(2) and any city within such a county may only adopt an ordinance imposing the excise tax authorized by this section if the ordinance is first authorized by a proposition approved by a majority of the voters of the taxing district voting on the proposition at a general election held within the district or at a special election within the taxing district called by the district for the purpose of submitting such proposition to the voters.

(2) Revenues generated from the tax imposed under subsection (1) of this section shall be used by such counties and cities solely for financing capital projects specified in a capital facilities plan element of a comprehensive plan.

(3) Revenues generated by the tax imposed by this section shall be deposited in a separate account.

(4) As used in this section, "city" means any city or town.

(5) When the governor files a notice of noncompliance under RCW 36.70A.340 with the secretary of state and the appropriate county or city, the county or city's authority to impose the additional excise tax under this section shall be temporarily rescinded until the governor files a subsequent notice rescinding the notice of noncompliance.

§ 82.46.070. Additional excise tax—Acquisition and maintenance of conservation areas

(1) Subject to subsection (2) of this section, the legislative authority of any county may impose an additional excise tax on each sale of real property in the county at a rate not to exceed one percent of the selling price. The proceeds of the tax shall be used exclusively for the acquisition and maintenance of conservation areas.

The taxes imposed under this subsection shall be imposed in the same manner and on the same occurrences, and are subject to the same conditions, as the taxes under chapter 82.45 RCW, except:

(a) The tax shall be the obligation of the purchaser; and

(b) The tax does not apply to the acquisition of conservation areas by the county.

The county may enforce the obligation through an action of debt against the purchaser or may foreclose the lien on the property in the same manner prescribed for the foreclosure of mortgages.

The tax shall take effect thirty days after the election at which the taxes are authorized.

(2) No tax may be imposed under subsection (1) of this section unless approved by a majority of the voters of the county voting thereon for a specified period and maximum rate after:

(a) The adoption of a resolution by the county legislative authority of the county proposing this action; or

(b) The filing of a petition proposing this action with the county auditor, which petition is signed by county voters at least equal in number to ten percent of the total number of voters in the county who voted at the last preceding general election.

The ballot proposition shall be submitted to the voters of the county at the next general election occurring at least sixty days after a petition is filed, or at any special election prior to this general election that has been called for such purpose by the county legislative authority.

(3) A plan for the expenditure of the excise tax proceeds shall be prepared by the county legislative authority at least sixty days before the election if the proposal is initiated by resolution of the county legislative authority, or within six months after the tax has been authorized by the voters if the proposal is initiated by petition. Prior to the adoption of this plan, the elected officials of cities located within the county shall be consulted and a public hearing shall be held to obtain public input. The proceeds of this excise tax must be expended in conformance with this plan.

(4) As used in this section, "conservation area" has the meaning given under RCW 36.32.570.